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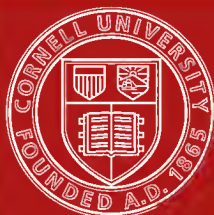
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A DIGEST  
OF THE  
LAW OF AGENCY.

BY

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A DIGEST  
OF  
THE LAW OF AGENCY.

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CHAPTER I.

PRELIMINARY.

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Article 1.

INTERPRETATION OF TERMS.

IN this book, unless a contrary intention appears from the context—

The expression “public agent” means an agent of the Crown or government;

The expression “agent” does not include public agent;

The expression “home agent” means an agent residing and carrying on business as such in England, Wales, or Ireland;

The expression “undisclosed principal” means a principal who is not known to be such by the person dealing with an agent;

The expression “foreign principal” means a

principal who does not reside or carry on business in England, Wales, or Ireland;

The expression "third person" means any person other than the principal or agent;

The expression "goods" includes wares and merchandise;

The expression "goods and chattels" includes all chattels personal;

The expression "property" includes every description of property, whether real or personal.

## CHAPTER II.

## CONSTITUTION OF THE RELATION OF AGENCY.

## Article 2.

DEFINITIONS OF AGENT, GENERAL AGENT, SPECIAL AGENT,  
FACTOR, BROKER, ETC.

AN agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal (*a*).

A general agent is an agent who has authority—

- (*a*) to act for his principal in all matters, or in all matters concerning a particular trade or business, or of a particular nature (*b*);  
OR

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(*a*) The difference between an agent and an independent contractor is, that an agent is bound to act in the matter of the agency subject to the directions and control of the principal, whereas an independent contractor merely undertakes to perform certain specified work, or produce a certain specified result, the manner and means of performance or production being left to his discretion, except so far as they are specified by the contract: see *Quarman v. Burnett*, 1840, 6 M. & W. 499; 55 R. R. 717; *Reedie v. L. & N. W. Rail. Co.*, 1849, 4 Ex. 244; 80 R. R. 541; *Hughes v. Percival*, 1882, 8 A. C. 443, H. L.; *Dalton v. Angus*, 1881, 6 A. C. 740, H. L.; *Jolliffe v. Woodhouse*, 1894, 10 T. L. R. 553, C. A.; *Lemaitre v. Davis*, 1881, 19 Ch. D. 281; *Black v. Christchurch Co.*, (1894) A. C. 48, H. L.; *Holliday v. National Telephone Co.*, (1899) 2 Q. B. 392, C. A.; *Hall v. Lees*, (1904) 2 K. B. 602, C. A.; *Hurlstone v. London Electric Rail. Co.*, 1914, 30 T. L. R. 398, C. A.

(*b*) See *Brady v. Todd*, 1861, 9 C. B. N. S. 592; 30 L. J. C. P. 223; *Smith v. M'Guire*, 1858; 3 H. & N. 554; 27 L. J. Ex. 465; 117 R. R. 853; *Barrett v. Irvine*, (1907) 2 Ir. R. 462, C. A. The distinction

(b) to do some act in the ordinary course of his trade, profession or business as an agent, on behalf of his principal; *e.g.*, where a solicitor, factor or broker is employed as such (*c*).

A special agent is an agent who has only authority to do some particular act, or represent his principal in some particular transaction, such act or transaction not being in the ordinary course of his trade, profession, or business as an agent (*c*).

A factor is a mercantile agent whose ordinary course of business is to sell or dispose of goods, of which he is intrusted with the possession or control by his principal (*d*).

A broker is an agent whose ordinary course of business is to negotiate and make contracts for the sale and purchase of goods and other property, of which he is not intrusted with the possession or control (*d*).

An auctioneer is an agent whose ordinary course of business is to sell by public auction goods or other property, of which he may or may not be intrusted with the possession or control.

A mercantile agent, within the meaning and for the purposes of the Factors Act, 1889 (*c*), is a mer-

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between general and special agents is only of importance in determining the nature and extent of the authority conferred. See Articles 36 to 39.

(c) See note (*b*), *ante*, p. 3.

(d) *Baring v. Corrie*, 1818, 2 B. & A. 137; 20 R. R. 383; *Stevens v. Biller*, 1883, 25 Ch. Div. 31; 53 L. J. Ch. 249, C. A.

(e) 52 & 53 Vict. c. 45. (This Act is set out in the Appendix.)

cantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods (*f*).

### Article 3.

#### DEL CREDERE AGENT DEFINED.

A *del credere* agent is a mercantile agent who, in consideration of an extra remuneration, which is called a *del credere* commission, guarantees to his principal that third persons with whom he enters into contracts on behalf of the principal shall duly pay any sums becoming due under those contracts (*g*).

In effect, a *del credere* agent is a surety for the persons with whom he deals (*g*). But it has been held that an agreement by an agent to sell on a *del credere* commission is not a promise to answer for the debt, default, or miscarriage of another person, within the meaning of the 4th section of the Statute of Frauds (*h*), and it is not necessary that such an agreement should be in writing (*h*). A *del credere* agency may be inferred from a course of conduct between the parties (*i*).

The principal is not entitled to litigate with a *del credere* agent any disputes arising out of contracts made by him. The obligation of the agent is confined to answering for the

(*f*) *Ibid.* s. 1; *Turner v. Sampson*, 1911, 27 T. L. R. 200. See Article 85.

(*g*) *Morris v. Cleasby*, 1816, 4 M. & S. 566; 14 R. R. 531; *Hornby v. Lacy*, 1817, 6 M. & S. 166; 18 R. R. 345; *Grove v. Dubois*, 1786, 1 T. R. 112; 16 R. R. 664.

(*h*) 29 Car. II. c. 3; *Couturier v. Hastie*, 1852, 22 L. J. Ex. 97; 8 Ex. 40; *Wickham v. Wickham*, 1855, 2 Kay & J. 487; 110 R. R. 328; *Sutton v. Grey*, (1894) 1 Q. B. 285; 63 L. J. Q. B. 633, C. A.

(*i*) *Shaw v. Woodcock*, 1827, 7 B. & C. 73; 31 R. R. 158.

failure by the other contracting parties, owing to insolvency or the like, to pay any ascertained sums which may become due from them as debts (*i*).

*Distinction between del credere agent and vendee.*—Where goods were consigned by A. to B. for the purpose of sale, and it was agreed that B. should have the right to sell at such prices and on such terms as he thought fit, and that B. should pay an agreed price for the goods sold by him within a fixed period after the sale thereof, it was held that the relation between A. and B. was that of vendor and purchaser, not that of principal and agent (*k*). But the mere fact that a person employed to sell goods is allowed by way of remuneration all the profit obtained by him over and above an agreed price, and that he guarantees the payment of that agreed price to the person employing him, does not prevent the relation between them being that of principal and agent, if it appears from the circumstances as a whole that their intention was to establish a *del credere* agency (*l*).

#### Article 4.

##### CAPACITY TO ACT AS PRINCIPAL.

Capacity to contract or do any other act by means of an agent is co-extensive with the capacity of the principal to himself make the contract or do the act that the agent is authorized to make or do. Provided that, where capacity to do a particular act exists only by virtue of a special custom, the act

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(*i*) *Gabriel v. Churchill*, (1914) 3 K. B. 1272; 84 J. J. K. B. 733, C. A.

(*k*) *Ex p. White, re Nevill*, 1870, 40 L. J. Bk. 73; L. R. 6 Ch. 397. See also *Towle v. White*, 1873, 29 L. T. 78, H. L.; *Livingstone v. Ross*, (1901) A. C. 327; 70 L. J. P. C. 58, P. C.; *Michelin Tyre Co. v. Macfarlane*, 1917, 55 Sc. L. R. 35, H. L.

(*l*) *Ex p. Bright, re Smith*, 1879, 48 L. J. Bk. 81; 10 Ch. Div. 566, C. A. See also *Weiner v. Harris*, (1910) 1 K. B. 285; 79 L. J. K. B. 342, C. A.

cannot be done by means of an agent unless the custom warrants its being so done (*m*).

Thus, an infant or lunatic is bound by a contract made by his agent with his authority, where the circumstances are such that he would have been bound if he had himself made the contract (*n*). On the other hand, a corporation or incorporated company has no capacity to appoint an agent for any purpose, or to do any act, beyond the scope of its charter or memorandum of association (*o*).

Formerly, a married woman had no power to appoint an attorney, but the 40th section of the Conveyancing Act, 1881 (*p*), provides that a married woman, whether an infant or not (*p*), shall have power, as if she were unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do (*q*).

(*m*) *Combe's case*, 9 Co. R. 75, where it was held that an infant had no power to appoint an attorney to make a feoffment on his behalf under the custom of gavelkind, though by virtue of the custom he had power to convey by feoffment himself.

(*n*) *Rex v. Longnor*, 1833, 4 B. & Ad. 647; *Drew v. Nunn*, 1879, 48 L. J. Q. B. 591; 4 Q. B. D. 661, C. A.; *Elliott v. Ince*, 1857, 7 De G. M. & G. 475; 109 R. R. 208; *Campbell v. Hooper*, 1855, 24 L. J. Ch. 644; 3 Sm. & G. 153; 107 R. R. 59; *Ewer v. Jones*, 1846, 16 L. J. Q. B. 42; 9 Q. B. 623; *Ex p. Bradbury, re Walden*, 1839, Mont. & Ch. 625; *Daily Telegraph Newspaper Co. v. M'Laughlin*, (1904) A. C. 776, P. C.

(*o*) *Montreal Assurance Co. v. M'Gillivray*, 1859, 13 Moo. P. C. C. 87; *Bateman v. Mid Wales Rail. Co.*, 1866, 35 L. J. C. P. 205; L. R. 1 C. P. 499; *Poulton v. L. & S. W. Rail. Co.*, 1867, 36 L. J. Q. B. 294; L. R. 2 Q. B. 534; *Ashbury Carriage Co. v. Riche*, 1875, 44 L. J. Ex. 185; L. R. 7 H. L. 653.

(*p*) 44 & 45 Vict. c. 41. Subject to this provision, a power of attorney given by an infant is void: *Zouch v. Parsons*, 1765, 3 Burr. 1784, 1804.

(*q*) A married woman cannot appoint an attorney to acknowledge a deed on her behalf under the Fines and Recoveries Act (3 & 4 Will. IV. c. 74): *Re Stables*, 1864, 33 L. J. Ch. 422.

## Article 5.

## CAPACITY TO ACT AS AGENT.

All persons of sound mind, including infants and other persons with limited or no capacity to contract or act on their own behalf, are competent to contract or act as agents. Provided that—

- (a) no party to a contract is competent to sign the contract, or a note or memorandum thereof, as the agent of another party thereto so as to satisfy the provisions of the 4th section of the Statute of Frauds, or (probably) of the 4th section of the Sale of Goods Act, 1893 (*r*);
- (b) the personal liability of the agent upon the contract of agency, and upon any contract entered into by him with any third person (*s*), is dependent on his capacity to contract on his own behalf (*t*).

An act done by an agent, as such, is deemed to be the act of the principal who authorized it, the agent being looked upon merely as an instrument: hence the rule that a person having no capacity to contract on his own behalf is competent to contract on behalf of, and so as to bind, his principal.

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(*r*) 29 Car. II. c. 3; 56 & 57 Vict. c. 71; *Sharman v. Brändt*, 1871, 40 L. J. Q. B. 312; L. R. 6 Q. B. 720; *Wright v. Dannah*, 1809, 2 Camp. 203; 11 B. R. 693; *Farebrother v. Simmons*, 1822, 5 B. & A. 333; 24 R. R. 399.

(*s*) See Chapter XII., sect. 1, as to when an agent is personally liable upon contracts made by him with third persons.

(*t*) *Smally v. Smally*, 1700, 1 Eq. Ab. 6.



Where an agent, who was unable to read, was authorized to enter into and sign a contract on his principal's behalf, it was held that the principal could not avoid a written contract made by the agent, on the ground of his inability to read it (*u*).

The agent of one party to a contract is not incompetent to act as the agent of the other party thereto, where he can do so consistently with his duty to his principal. Thus, a broker frequently acts for both the buyer and the seller of goods, and an insurance broker may, though he does not necessarily, act as agent for the underwriters as well as the assured (*x*). The signature of a broker employed by both buyer and seller, or of an auctioneer, to a contract of sale, operates as the signature of both parties within the meaning of the 4th or 17th section of the Statute of Frauds, or of the 4th section of the Sale of Goods Act, 1893 (*y*). And it has been held that a clerk or factor of one of the parties to a contract is competent to act as the agent of the other party for the same purpose (*z*).

### Article 6.

#### WHAT ACTS MAY BE DONE BY MEANS OF AN AGENT.

An agent may be appointed for the purpose of executing any deed, or making any contract, or doing any other act on behalf of the principal, which the principal might himself execute, make,

(*u*) *Foreman v. G. W. Rail. Co.*, 1878, 38 L. T. 851.

(*x*) *Shee v. Clarkson*, 1810, 12 East, 507; 11 R. R. 473; *Empress Ass. Corpn. v. Bowring*, 1908, 11 Com. Cas. 107; *Glasgow Ass. Corpn. v. Symondson*, 1911, 104 L. T. 254.

(*y*) *Thompson v. Gardiner*, 1876, 1 C. P. D. 777; *Emmerson v. Heelis*, 1809, 2 Taunt. 38; 11 R. R. 520; *White v. Proctor*, 1811, 4 Taunt. 209; 13 R. R. 580; *Hinde v. Whitehouse*, 1806, 7 East, 558; 8 R. R. 676.

(*z*) *Durrell v. Evans*, 1862, 31 L. J. Ex. 337; 1 H. & C. 174, Ex. Oh.; *Bird v. Boulter*, 1833, 4 B. & Ad. 443; 38 R. R. 285.

or do ; except for the purpose of exercising a power or authority conferred, or of performing a duty imposed (*a*), on the principal personally, the exercise or performance of which involves discretion or skill (*b*), or for the purpose of doing an act which the principal is required, by or pursuant to any statute, to do in his own proper person (*c*).

### *Illustrations.*

1. A foreign corporation by a contract submits to the jurisdiction of the English Courts. It may appoint a person as its agent to accept service of the writ on its behalf, and service on such agent is valid, though it would not be a good service according to the Rules of Court (*d*). So, a person domiciled or ordinarily resident in Scotland or Ireland may

(*a*) A person cannot, by delegating to an agent or contractor the performance of a duty imposed upon him, escape from liability for the non-performance or improper performance of that duty. See cases cited *ante*, p. 3, note (*a*); *Hardaker v. Idle District Council*, (1896) 1 Q. B. 335; 65 L. J. Q. B. 363, C. A.; *Hill v. Tottenham U. C.*, 1899, 79 L. T. 495; *Penny v. Wimbledon U. C.*, (1899) 2 Q. B. 722; 68 L. J. Q. B. 704, C. A.; *The Snark*, (1905) P. 105; 69 L. J. P. 41, C. A.; *The Bearn*, (1906) P. 48; 75 L. J. P. 9, C. A.; *Robinson v. Beaconsfield U. C.*, (1911) 2 Ch. 188; 80 L. J. Ch. 647, C. A. The performance of a duty which is merely ministerial, and does not involve discretion or skill, may, however, be delegated: *London County Council v. Hobbs*, 1897, 75 L. T. 688. As to the delegation by a sheriff of his duties, see *Gregory v. Cotterell*, 1855, 5 E. & B. 571; 103 R. R. 629.

(*b*) Illustration 6. As to the employment of agents by trustees, see Trustee Act, 1893, s. 17. And see *Speight v. Gaunt*, 1883, 53 L. J. Ch. 419; 9 App. Cas. 81, H. L.; *Fry v. Tapson*, 1884, 54 L. J. Ch. 224; 18 Ch. D. 268; *Bath v. Standard Land Co.*, (1911) 1 Ch. 618; 80 L. J. Ch. 426, C. A.

(*c*) As for instance, the acknowledgment by a married woman of a deed under the Fines and Recoveries Act (3 & 4 Will. IV. c. 74): *Re Stables*, 1864, 33 L. J. Ch. 422.

(*d*) *Tharsis Copper Co. v. La Société des Metaux*, 1889, 58 L. J. Q. B. 435. And see *La Bourgogne*, (1899) A. C. 431; 68 L. J. P. 104, H. L.;

appoint an agent to accept service of a writ on his behalf within the jurisdiction, and such a service is a valid service within the jurisdiction on the principal (*e*).

2. A bill of sale may be executed by an attorney on behalf of the grantor, and the grantee of the bill of sale is not necessarily incapable of acting as such attorney (*f*).

3. A written offer to purchase land is made to an agent in his own name, the name of the principal not appearing in the offer. The agent accepts the offer on behalf of his principal, naming him. The offer and acceptance show sufficiently who are the contracting parties to satisfy the Statute of Frauds (*g*).

4. A partner may exercise his right to inspect and take copies from partnership books under sect. 24 (9) of the Partnership Act, 1890 (53 & 54 Vict. c. 39), by means of an agent to whom no personal objection can be made by the co-partners (*h*).

5. An information for an offence against the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), may be laid by an agent duly authorized in that behalf by an inspector under the Act (*i*); and an inspector under sect. 3 of the Sale of Food and Drugs Act, 1879 (42 & 43 Vict. c. 30), may procure a sample by means of an agent, and lay an information in his own name in respect of an analysis of the sample so procured (*k*).

*Saccharin Corpn. v. Chemische Fabrik von Heyden Actiengesellschaft*, (1911) 2 K. B. 516; 80 L. J. K. B. 1117, C. A.; *Thames & Mersey Marine Ins. Co. v. Societa, &c. del Lloyd Austriaco*, 1914, 111 L. T. 97, C. A.

(*e*) *Montgomery v. Liebenthal*, (1898) 1 Q. B. 487; 67 L. J. Q. B. 313, C. A.

(*f*) *Furnivall v. Hudson*, (1893) 1 Ch. 335; 62 L. J. Ch. 178. See also *Re Wilson*, (1916) 1 K. B. 382; 85 L. J. K. B. 329.

(*g*) *Filby v. Hounsell*, (1896) 2 Ch. 737; 65 L. J. Ch. 852. Cp. *Lovesy v. Palmer*, (1916) 2 Ch. 233; 85 L. J. Ch. 481.

(*h*) *Bevan v. Webb*, (1901) 2 Ch. 59; 70 L. J. Ch. 536, C. A. And see *Norey v. Keep*, (1909) 1 Ch. 561; 78 L. J. Ch. 334.

(*i*) *Foster v. Fyfe*, (1896) 2 Q. B. 104; 64 L. J. M. C. 184.

(*k*) *Tyler v. Dairy Supply Co.*, 1908, 98 L. T. 867.

6. *Discretionary powers*.—A person who is given a power or authority of a discretionary nature must, as a general rule, exercise it in person. Thus, where the consent of a particular person was required for the execution of a power of appointment, it was held that he had no power to appoint an agent to consent thereto in his place, the authority being one involving personal discretion (*l*). So, the donee of a special power of appointment cannot delegate the power to an agent (*m*). The rules as to delegation of authority by agents are founded upon the same principle (*n*).

7. *Statutes requiring personal performance*.—Lord Tenterden's Act (*o*) requires that certain transactions, to be effectual in law, shall be evidenced by writing, signed by the parties to be charged. It has been held that, to satisfy the provisions of that statute, the document must be signed by the party himself, and that the signature of an agent is insufficient even if expressly ratified by the principal (*p*). But, as a general rule, where the signature of a person is required by statute, it is sufficient if the name of that person is signed by a duly authorized agent, unless a contrary intention plainly appears (*q*). Thus, an agent may be appointed to subscribe the name of the principal to the

(*l*) *Hawkins v. Kemp*, 1803, 3 East, 410.

(*m*) *Ingram v. Ingram*, 1740, 2 Atk. 88; *Topham v. Portland*, 1863, 32 L. J. Ch. 257.

(*n*) See Article 40.

(*o*) 9 Geo. IV. c. 14, s. 6.

(*p*) *Williams v. Mason*, 1873, 28 L. T. 232; *Swift v. Jewesbury*, 1874, 43 L. J. Q. B. 56; L. R. 9 Q. B. 301, Ex. Ch.; *Hirst v. West Riding Banking Co.*, (1901) 2 K. B. 560; 70 L. J. K. B. 828; *Hyde v. Johnson*, 1836, 5 L. J. C. P. 291; 3 Scott, 289; 42 R. R. 737. The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 13, renders the decision in this last case unimportant.

(*q*) *France v. Dutton*, (1891) 2 Q. B. 208; 60 L. J. Q. B. 488. And see *In re African Farms*, (1906) 1 Ch. 640; 75 L. J. Ch. 378, where, on a petition for the winding up of a company, the Court accepted an affidavit of the attorney of the petitioner in verification of the petition. Comp. *Fricker v. Van Grutten*, (1896) 2 Ch. 649; 65 L. J. Ch. 823, C. A.

memorandum of association of a joint stock company (*r*), or to the instrument of dissolution of a building society (*s*), and such a signature is a sufficient compliance with the 2nd section of the Companies (Consolidation) Act, 1908, or the 32nd section of the Building Societies Act, 1874.

### Article 7.

#### CO-AGENTS.

Where an authority is given to two or more persons, it is presumed to be given to them jointly, unless a contrary intention appears from the nature or terms of the authority, or from the circumstances of the particular case (*t*).

All the co-agents must concur in the execution of a joint authority, in order to bind the principal, in the absence of a provision that a certain number of them shall form a quorum (*t*); provided that, where the authority is of a public nature, and the persons in whom it is invested all meet for the purpose of executing it, the act of the majority is, for this purpose, deemed to be the act of the whole body (*u*).

Where an authority is given to two or more persons severally, or jointly and severally, any one or more of them may execute it without the concurrence of the other or others (*x*).

(*r*) *Re Whitley, Ex p. Callan*, 1886, 55 L. J. Ch. 540; 32 Ch. D. 337, C. A.

(*s*) *Dennison v. Jeffs*, (1896) 1 Ch. 611; 65 L. J. Ch. 435.

(*t*) *Brown v. Andrew*, 1849, 18 L. J. Q. B. 153; 83 R. R. 842; *Boyd v. Durand*, 1809, 2 Taunt. 161. Illustrations 1 to 4.

(*u*) *Grindley v. Barker*, 1798, 1 B. & P. 229; 4 R. R. 787; *Cortis v. Kent Waterworks Co.*, 1827, 7 B. & C. 314.

(*x*) Illustration 5. I have ventured to disregard as obsolete the

*Illustrations.*

1. A provisional committee appointed eight specified persons to act as a managing committee on their behalf. Six of such persons gave an order within the scope of the authority conferred. Held, that the provisional committee were not bound by the order (*y*).

2. Two persons filled the office of clerk to the trustees of a road. Held, that they must contract jointly in order to bind the trustees (*z*).

3. The regulations of a company provide that the business shall be managed by directors, a certain number of whom shall constitute a board. The company is not bound by the acts of the directors, unless consented to by them all, or by a majority present at a duly convened and constituted board meeting (*a*).

4. The directors of a company, being duly authorized in that behalf, resolved that all their powers, except their power to make calls, should be delegated to three of their number as a committee. Held, that at a meeting of the committee for the purpose of exercising such powers, all the members of the committee must be present (*b*).

5. A power of attorney was given to fifteen persons, "jointly or severally to execute such policies as they or any of them should jointly or severally think proper." Held, that a policy executed by four of such persons was binding on the principal (*c*).

law laid down in Co. Litt. 181 (*b*) as to joint and several authorities given to three or more persons.

(*y*) *Brown v. Andrew*, 1849, 18 L. J. Q. B. 153; 83 R. R. 842.

(*z*) *Bell v. Nixon*, 1832, 9 Bing. 393.

(*a*) *Ridley v. Plymouth Grinding Co.*, 1848, 2 Ex. 711; 76 R. R. 742; *Kirk v. Bell*, 1850, 16 Q. B. 290; 83 R. R. 456; *Ex p. Smith*, 1888, 39 Ch. D. 546; *D'Arcy v. Tamar Rail. Co.*, 1866, L. R. 2 Ex. 158; *Re Haycraft, &c. Co.*, (1900) 2 Ch. 230.

(*b*) *Re Liverpool Household Stores*, 1890, 59 L. J. Ch. 616.

(*c*) *Guthrie v. Armstrong*, 1822, 5 B. & A. 628.

## Article 8.

## HOW THE RELATION OF AGENCY MAY BE CONSTITUTED.

The relation of agency exists, and can only exist, by virtue of the express or implied assent of both principal and agent (*d*), except in certain cases of necessity, in which the relation is imposed by operation of law (*e*).

The assent of the principal is implied whenever another person occupies such a position that, according to the ordinary usages of mankind, he would be understood to have the principal's authority to act on his behalf (*f*).

The assent of the agent is implied whenever he acts or assumes to act on behalf of another person, and after having so acted or assumed to act he is not permitted, in an action by such person, to deny that the agency in fact existed, or that he acted on such person's behalf (*g*).

(*d*) *Markwick v. Hardingham*, 1880, 15 Ch. Div. 339, 349, C. A.; *Pole v. Leask*, 1862, 33 L. J. Ch. 155; *Love v. Mack*, 1905, 93 L. T. 352, C. A.

(*e*) Illustrations 11 and 12. It is doubtful how far the principle of agency of necessity extends in English law, and whether it is not confined to certain recognized cases, such as those of shipmasters, common carriers, salvors, &c. See per Esher, M. R., in *Gwilliam v. Twist*, (1895) 2 Q. B. 84; 64 L. J. Q. B. 474, C. A. As to the implied authority of shipmasters as agents of necessity, see *post*, pp. 101 to 108.

(*f*) See the judgment in *Pole v. Leask*, 1862, 33 L. J. Ch. 155, H. L. Illustrations 1 to 10; Article 81, Illustration 10.

(*g*) *Roberts v. Ogilby*, 1821, 9 Price, 269; 23 R. R. 671; *Moore v. Peachey*, 1891, 7 T. L. R. 748.

The relationship of principal and agent may be constituted—

- (a) by express appointment by the principal (*h*), or by a person duly authorized by the principal to make such appointment (*i*);
- (b) by implication of law from the conduct or situation of the parties (*k*), or from the necessity of the case (*l*); or
- (c) by subsequent ratification by the principal of acts done on his behalf (*m*).

Where a person assumes to act on behalf of another, the assent of the person on whose behalf the act is done will not be implied from his mere silence or acquiescence, unless the situation of the parties is such as to raise a presumption that the act is done by his authority (*n*).

### *Illustrations.*

1. A receiver appointed by a mortgagee in pursuance of the implied power conferred by the Conveyancing Act, 1881, is in the performance of his duties as receiver an agent of the mortgagor, and if appointed after the death of the mortgagor, is an agent of his legal personal representatives to the extent of the assets (*o*).

(*h*) See Chapter IV.

(*i*) Illustrations 1 and 2; Article 41, Illustration 1.

(*k*) Illustrations 3 to 10. See also Chapter III., as to the implied agency of married women, &c., and pp. 101 to 108 as to the implied agency of shipmasters.

(*l*) *Ante*, p. 15, note (*r*).

(*m*) See Chapter V.

(*n*) Illustrations 13 and 14.

(*o*) *Re Hale, Lilley v. Foad*, (1899) 2 Ch. 107; 68 L. J. Ch. 517, C. A.



2. By a trust deed securing debentures, the property of the company was transferred to trustees upon trust to permit the company to carry on the business until the happening of certain specified events, on the happening of which the trustees were empowered to appoint a receiver, and it was provided that any receiver so appointed should be the agent of the company, who alone should be liable for his acts and defaults. It was held that a receiver so appointed, who entered into possession and carried on the business of the company, was not an agent of the trustees, and that they were not liable for the price of goods supplied for the purposes of the business (*p*). But where power was given by debentures to the holders to appoint a receiver to take possession of the property charged and carry on the business of the company, and to sell the property charged and make any arrangements or compromise in the interests of the debenture holders, and it was not provided that the receiver should be an agent of the company, it was held that a receiver appointed in pursuance of the power was an agent of the debenture holders and not of the company (*q*). So, a receiver and manager of the business of a company appointed by the Court at the instance of debenture holders is not an agent of the company (*r*).

3. A debtor, being embarrassed, executes a deed whereby A. and B. are appointed inspectors, with power to control him in carrying on the business, and to receive moneys and pay current expenses, &c., but not to take the management of the business out of his hands. The debtor is not an agent

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(*p*) *Gosling v. Gaskell*, (1897) A. C. 575; 66 L. J. Q. B. 848, H. L.

(*q*) *Re Vimbos*, (1900) 1 Ch. 470; 69 L. J. Ch. 209; *Deyes v. Wood*, (1911) 1 K. B. 806; 80 L. J. K. B. 553, C. A.

(*r*) *Burt v. Bull*, (1895) 1 Q. B. 276; 64 L. J. Q. B. 232, C. A. And see *Boehm v. Goodall*, 1910, 27 T. L. R. 106. A person authorized under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 116 and 120, to carry on the business of a lunatic not so found, is in the position of an agent of the lunatic for that purpose: *Plumpton v. Burkinshaw*, (1908) 2 K. B. 572; 77 L. J. K. B. 961, C. A.

of A. and B. to carry on the business, but a principal carrying on his own business subject to their inspection and control (s).

4. A debtor, by deed, assigns his business and effects to A. and B. as trustees to continue the business in his name, for the benefit of his creditors, and, in accordance with the provisions of the deed, the debtor is employed by A. and B. to carry on the business. The debtor is an agent of A. and B. for the purpose of carrying on the business, and they are liable on contracts made by him in the ordinary course thereof in his own name (t). The debtor is not, nor are A. and B., an agent or agents of the creditors in carrying on the business (u).

5. A. buys property at a sale by auction. The auctioneer is an implied agent of A. for the purpose of signing the contract of sale on his behalf, so as to satisfy the requirements of the 4th section of the Statute of Frauds (x), or of the 4th section of the Sale of Goods Act, 1893 (y), it being understood that the auctioneer has authority, in the ordinary course of business, to sign the contract on behalf of the highest bidder (z). Subsequently to the sale, B. buys certain unsold lots by private contract with the auctioneer. The auctioneer is not an implied agent of B. for the purpose of signing the contract on his behalf (a).

(s) *Redpath v. Wigg*, 1866, 35 L. J. Ex. 311; L. R. 1 Ex. 335, Ex. Ch.; *Easterbrook v. Barker*, 1870, 40 L. J. C. P. 17; L. R. 6 C. P. 1; *Hobson v. Jones*, 1870, 39 L. J. Ch. 245; L. R. 9 Eq. 456.

(t) *Furze v. Sharwood*, 1841, 2 Q. B. 388. Comp. *Nicholls v. Kuypman*, 1910, 102 L. T. 306, C. A.

(u) *Cox v. Hickman*, 1861, 30 L. J. C. P. 125; 9 H. L. Cas. 268, H. L.

(x) 29 Car. II. c. 3.

(y) 56 & 57 Vict. c. 71.

(z) *Emmerson v. Heelis*, 1809, 2 Taunt. 38; 11 R. R. 520; *White v. Proctor*, 1811, 4 Taunt. 209; 13 R. R. 580. But see *Van Praagh v. Everidge*, (1903) 1 Ch. 434; 72 L. J. Ch. 260, C. A.

(a) *Mews v. Carr*, 1856, 1 H. & N. 484; 108 R. R. 683. See, also, *Bell v. Balls*, (1897) 1 Ch. 663; 66 L. J. Ch. 397.

6. A. buys property at a sale by auction, and, at the request of the auctioneer's clerk, who is acting under the directions of the auctioneer, gives his name and address as purchaser, and stands by while the clerk fills in the name and address in a memorandum of the sale. The memorandum is signed by a duly authorized agent of A. within the meaning of the Statute of Frauds, the conduct of A. being such as to show that he assented to the clerk's signing his name on his behalf (*b*). The implied authority of the auctioneer to sign on behalf of a purchaser does not, however, extend to the auctioneer's clerk, and a purchaser is not bound by the signature of the clerk, unless he indicates, by word or sign, that he assents to the clerk's signing for him (*c*).

7. A. bought goods at a sale by auction, the vendor having previously agreed with him that the price of any goods he might buy should be set off against a debt. Held, that the auctioneer, though not aware of the previous agreement with the vendor, had no authority to sign on A.'s behalf a contract subject to a condition providing for payment in cash (*d*).

8. A. is a mortgagor in possession. He is an implied agent of the mortgagee to distrain for rent due under a lease granted prior to the mortgage (*e*). But a mere pledgee of an insurance policy has no implied authority, as such, to give, on behalf of the pledgor, a notice of abandonment to the underwriters (*f*).

9. Property is sold under a decree. The solicitor having the management of the sale is, in the conduct thereof,

(*b*) *Sims v. Landray*, (1894) 2 Ch. 318; 63 L. J. Ch. 535; *Bird v. Boulter*, 1833, 1 N. & M. 313; 38 R. R. 285.

(*c*) *Bell v. Balls*, (1897) 1 Ch. 663; 66 L. J. Ch. 397.

(*d*) *Bartlett v. Purnell*, 1836, 5 L. J. K. B. 169; 4 A. & E. 792; 43 R. R. 484.

(*e*) *Trent v. Hunt*, 1853, 9 Ex. 14; 22 L. J. Ex. 318; 96 R. R. 517; *Snell v. Finch*, 1863, 32 L. J. C. P. 117; 13 C. B. N. S. 651.

(*f*) *Jardine v. Leathley*, 1863, 32 L. J. Q. B. 132; 3 B. & S. 700.

deemed to be the agent of all the parties to the suit, as between them and the purchaser (*g*).

10. The promoters of a company are not, as such, implied agents to pledge the credit, or receive money on behalf, of each other, in connection with the promotion of the company. Nor are the officers of a proposed company, as such, implied agents of the promoters thereof (*h*).

11. A. deserts his wife, leaving her unprovided for. She has authority by law, as an agent of necessity, to pledge his credit for necessaries suitable to her station in life, he being legally bound to provide for her; and such authority cannot be revoked by him (*i*).

12. A. sends a horse by railway, consigned to himself at a station on the line. There is no one to receive the horse at the destination. The railway company, being bound to take reasonable measures for the preservation of the horse, is an agent of necessity of A. for that purpose (*k*).

13. A. called at B.'s office and verbally agreed to be responsible for the price of certain goods to be supplied by B. to a third person. B.'s clerk, in A.'s presence, made and signed a memorandum of the agreement. Held, that the clerk had no implied authority to sign as A.'s agent, and that there was not a sufficient memorandum in writing of the agreement to satisfy the 4th section of the Statute of Frauds (*l*).

14. A.'s traveller sold goods to B., and in B.'s presence wrote out two memoranda of the sale, and put B.'s name upon them. One of the memoranda he handed to B., the other he retained. Held, that he had no implied authority

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(*g*) *Dalby v. Pullen*, 1830, 1 Ru.s. & M. 296; 30 R. R. 123.

(*h*) See Article 88, Illustration 3, and cases there cited; *Burnside v. Dayrell*, 1849, 3 Ex. 224; 19 L. J. Ex. 46; 77 R. R. 612.

(*i*) See Article 15.

(*k*) *G. N. R. Co. v. Swaffield*, 1874, 43 L. J. Ex. 89; L. R. 9 Ex. 132. See also *Sims v. Mid. R. Co.*, (1913) 1 K. B. 103; 82 L. J. K. B. 67.

(*l*) *Dixon v. Broomfield*, 1814, 2 Chit. 205.

to sign a memorandum of the contract as B.'s agent, and that the memorandum was not sufficient to satisfy the 17th section of the Statute of Frauds as against B. (*m*). Otherwise, if B. had by his conduct shown an intention to constitute the traveller his agent for the purpose of making a record of the contract on his behalf (*n*).

### Article 9.

#### AGENCY BY ESTOPPEL.

Where any person, by words or conduct, represents or permits it to be represented that another person is his agent, he will not be permitted to deny the agency with respect to any third persons dealing, on the faith of any such representation, with the person so held out as an agent, even if no agency exists in fact (*o*).

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(*m*) *Murphy v. Boëse*, 1875, 44 L. J. Ex. 40; L. R. 10 Ex. 126; *Graham v. Musson*, 1839, 8 L. J. C. P. 324; 7 Scott, 769; 50 R. R. 807; *Graham v. Fretwell*, 1841, 3 M. & G. 368.

(*n*) *Durrell v. Evans*, 1862, 31 L. J. Ex. 337; 1 H. & C. 174, Ex. Ch.

(*o*) See illustrations to Article 88. This is an instance of the principle of estoppel *in pais*: *Pole v. Leask*, 1862, 33 L. J. Ch. 155, H. L.

## CHAPTER III.

## IMPLIED AGENCY OF MARRIED WOMEN, ETC.

THE implied authority of a wife to pledge the credit of her husband arises partly from her position as manager of his household, partly from his duty to keep her provided with necessaries suitable to her station in life, or to the style in which he permits her to live (*a*). Formerly, where a wife carried on a separate trade with the permission of her husband, she had implied authority to pledge his credit for goods supplied for the purposes of such trade. But, since the passing of the Married Women's Property Act, 1882 (*b*), the presumption is that contracts made by a wife for the purposes of a separate trade or business carried on by her, are made on her own behalf in respect of her separate property; and her husband is not liable on any such contract, unless it is proved that credit was given to him, and that either he expressly authorized her to pledge his credit, or held her out as having such authority to the person with whom the contract was made. A wife's implied authority to pledge her husband's credit is now restricted to necessaries, either for herself or for the household, and it is not increased nor diminished by the insanity or lunacy of the husband (*c*).

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(*a*) See *Phillipson v. Hayter*, 1870, 40 L. J. C. P. 14; L. R. 6 C. P. 38. As to what are considered necessaries, see *Morgan v. Chetwynd*, 1865, 4 F. & F. 451; *Jewsbury v. Newbold*, 1857, 26 L. J. Ex. 247; 112 R. R. 927; *Hunt v. De Blaquiere*, 1829, 5 Bing. 550; 30 R. R. 737; *Ladd v. Lynn*, 1837, 2 M. & W. 265; *Goodyear v. Part*, 1897, 13 T. L. R. 395.

(*b*) 45 & 46 Vict. c. 75.

(*c*) *Richardson v. Du Bois*, 1869, 39 L. J. Q. B. 69; L. R. 5 Q. B. 51; *Read v. Legard*, 1851, 6 Ex. 636; 20 L. J. Ex. 309; 86 R. R. 418.

The existence and nature of the authority depend upon whether she lives with her husband or not; and if not, upon what is the cause of the separation, and whether it is by mutual consent or otherwise.

### Article 10.

#### PRESUMPTION OF AUTHORITY FROM COHABITATION.

Where a husband and wife live together, the mere fact of cohabitation raises a presumption that she has authority to pledge his credit for necessaries suitable to the style in which they live (*d*); but there is no presumption of authority to borrow money in his name, even for the purpose of purchasing necessaries for the price of which he would have been liable if they had been bought on his credit (*e*).

The presumption of authority from the mere fact of cohabitation may be rebutted by proof—

- (a) that she had not in fact authority to pledge his credit (*f*); or
- (b) that she was already adequately provided with necessaries, or that he had made her a sufficient or agreed allowance therefor (*g*).

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(*d*) *Harrison v. Grady*, 1865, 13 L. T. 369; *Jolly v. Rees*, 1864, 33 L. J. C. P. 177; 15 C. B. N. S. 628; *Waithman v. Wakefield*, 1807, 1 Camp. 120; 10 R. R. 654.

(*e*) *Knox v. Bushell*, 1857, 3 C. B. N. S. 334; 111 R. R. 676. See, however, *Davidson v. Wood*, 1863, 32 L. J. Ch. 400; 1 De G. J. & S. 465; *Re Cook, Ex parte Vernall*, 1892, 10 Mor. 8.

(*f*) *Jolly v. Rees*, 1864, 32 L. J. C. P. 177; 15 C. B. N. S. 628; *Debenham v. Mellon*, 1880, 50 L. J. Q. B. 155; 6 App. Cas. 24, H. L.

(*g*) *Scaton v. Benedict*, 1828, 5 Bing. 28; *Debenham v. Mellon, supra*;

*Authority is confined to suitable necessities.*—The presumption of authority from cohabitation is confined to necessities suitable to the style in which the husband chooses to live (*h*). If the wife orders things which are not suitable to his style of living (*i*), or if the orders are of an extravagant nature (*k*), or are excessive in extent (*k*), there is no presumption of authority, and the husband is not liable, unless he is proved to have expressly authorized her, or held her out as having authority, to give the orders, or to have ratified the transactions. The question whether the things are suitable necessities is a question of fact for the jury; and the burden of proof lies on the person supplying them (*h*), except in the case of such things as wearing apparel, delivered at the joint residence (*l*), which are presumed to be necessities until the contrary is shown (*l*).

*Effect of forbidding her to pledge his credit.*—Even in the case of suitable necessities, the presumption of authority may be rebutted by proof that she had no authority in fact. The question whether the wife acted as her husband's agent, and with his authority, in any particular transaction, is a question for the jury to decide upon the evidence given (*m*); and the proper question to leave to them is whether the things were supplied to his credit and with his authority,

*Reneaux v. Teakle*, 1853, 8 Ex. 680; 22 L. J. Ex. 241; 91 R. R. 703; *Remington v. Broadwood*, 1902, 18 T. L. R. 270, C. A.; *Morel v. Westminsterland*, (1904) A. C. 11; 73 L. J. K. B. 93, H. L.

(*h*) *Phillipson v. Hayter*, 1870, 40 L. J. C. P. 14; L. R. 6 C. P. 38.

(*i*) *Harrison v. Grady*, 1865, 13 L. T. 369; *Montagu v. Benedict*, 1825, 5 D. & R. 532; 27 R. R. 444; *Atkins v. Curwood*, 1837, 7 C. & P. 756.

(*k*) *Debenham v. Mellon*, *ante*, note (*f*); *Lane v. Ironmonger*, 1844, 14 L. J. Ex. 35; 13 M. & W. 368; 67 R. R. 647; *Freestone v. Butcher*, 1840, 9 C. & P. 643.

(*l*) *Jewsbury v. Newbold*, 1857, 26 L. J. Ex. 247; 112 R. R. 927; *Clifford v. Laton*, 1827, 3 C. & P. 15.

(*m*) *Lane v. Ironmonger*, 1844, 13 M. & W. 368; 14 L. J. Ex. 35; 67 R. R. 647; *Freestone v. Butcher*, 1840, 9 C. & P. 643.



not merely whether they were suitable necessaries (*n*). If the jury find that she did not intend to pledge his credit, but contracted in respect of her separate estate (*o*), or that, though she intended to pledge his credit, he had in fact forbidden her to do so (*p*), he is not liable, even if the person who supplied the necessaries had no notice that her authority had been revoked (*p*), unless the husband had invested her with an appearance of authority, or had done some act leading the plaintiff to suppose that she had his authority to order them (*p*). But if a husband, by words or conduct, holds his wife out as having authority, he is liable to any person dealing with her on the faith of such holding out, notwithstanding a revocation of her authority, and though he had expressly forbidden her to pledge his credit, unless such person had actual notice of the revocation or prohibition (*q*).

### Article 11.

#### IMPLIED AUTHORITY AS HOUSEKEEPER.

Where a wife, who is living with her husband, has the management of the household, she is his general agent in all household matters, and has implied authority to pledge his credit for all such things as are necessary in the ordinary course of such management, and are usually bought on credit (*r*).

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(*n*) *Reich v. Teakle*, 1853, 13 C. B. 627; 22 L. J. C. P. 161; *Shoolbred v. Baker*, 1867, 16 L. T. 359.

(*o*) *Freestone v. Butcher*, 1840, 9 C. & P. 643.

(*p*) *Jolly v. Rees*, 1864, 33 L. J. C. P. 177; 15 C. B. N. S. 628; *Debenham v. Mellon*, 1880, 50 L. J. Q. B. 155; 6 App. Cas. 24, H. L.

(*q*) *Jetley v. Hill*, 1884, 1 C. & E. 239; *Filmer v. Lynn*, 1835, 4 N. & M. 559; *Debenham v. Mellon*, *supra*. And see Article 11.

(*r*) *Emmett v. Norton*, 1838, 8 C. & P. 506; 56 R. R. 848; *Phillipson v. Hayter*, 1870, 40 L. J. C. P. 14; L. R. 6 C. P. 38.

Every act done by a wife within the scope of her implied authority as manager of his household binds the husband, unless she has in fact no authority to do the particular act, and the person dealing with her has, at the time of the transaction, notice that she is exceeding her actual authority (*s*).

*Illustrations.*

1. The wife of a labourer ordered provisions for the house. The husband was held liable for the price, though he had supplied his wife with sufficient money to keep house, the person supplying the goods having had no notice of that fact (*t*).

2. A husband, during temporary absence from home, made his wife a sufficient allowance for herself and the family. A tradesman supplied her with goods on credit, knowing that the husband had made her the allowance. Held, that the husband was not liable for the price of the goods (*u*).

Where a wife occupies the position of her husband's housekeeper, he is deemed to hold her out to the world as having the usual authority of a housekeeper, and is bound by all acts within the scope of such apparent authority, unless the persons dealing with her know that her authority is expressly limited, and that she is acting in excess thereof (*x*). Her implied authority as housekeeper is, however, confined to necessaries connected with the domestic department and suitable to the style in which the husband lives, and it does not extend to articles of luxury (*y*). The onus of proof that goods supplied on her orders are suitable necessaries lies on the persons supplying them (*y*).

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(*s*) Illustrations 1 and 2; *Debenham v. Mellon*, *ante*, note (*p*).

(*t*) *Ruddock v. Mursh*, 1857, 1 H. & N. 601; 108 R. R. 743. But see *Morel v. Westmoreland*, (1904) A. C. 11; 73 L. J. K. B. 93, H. L.

(*u*) *Holt v. Brien*, 1821, 4 B. & A. 252.

(*x*) See note (*r*), *ante*.

(*y*) *Phillipson v. Hayter*, 1870, 40 L. J. C. P. 14; L. R. 6 C. P. 38.

## Article 12.

## PRIMA FACIE, NO AUTHORITY WHERE SEPARATED.

Where a wife is separated from her husband, she has, *primâ facie*, no authority to pledge his credit, and the burden lies upon any person seeking to charge the husband on her contracts of proving that the circumstances of the separation are such as to raise a presumption of authority (*z*).

A wife who is judicially separated from her husband, or who has obtained a protection or separation order, is considered as a *feme sole* for the purposes of contract, and her husband is not liable in respect of any contract she may enter into, or for any costs she may incur, while so separated; provided that if alimony has been decreed or ordered to be paid to the wife, and is not duly paid, the husband is liable for necessaries supplied for her use (*a*).

Where a tradesman gives credit to a wife living apart from her husband, he ought to make inquiries as to the cause of the separation; and if he does not do so, he trusts her at his peril, and is not entitled to charge the husband, unless he proves that she is justified in living apart (*b*). Where the

(*z*) *Edwards v. Towels*, 1843, 12 L. J. C. P. 239; 6 Scott, N. R. 641; *Johnston v. Sumner*, 1858, 27 L. J. Ex. 341; 3 H. & N. 261; 117 R. R. 769.

(*a*) 20 & 21 Vict. c. 85 (Matrimonial Causes Act, 1857), ss. 21, 26; Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (*a*); *Re Wingfield*, (1904) 2 Ch. 665; 73 L. J. Ch. 797, C. A.

(*b*) *Mainwaring v. Leslie*, 1826, 2 C. & P. 507; 31 R. R. 691; *Reed v. Moore*, 1832, 5 C. & P. 200; *Clifford v. Laton*, 1827, 3 C. & P. 15.

husband was living abroad, and it was sought to charge him for necessaries supplied to his wife in England, it was held that the plaintiff must prove that she was not sufficiently provided for, and that it was necessary for her to pledge her husband's credit (*c*). Even if the tradesman has no notice of the separation, he is not entitled to charge the husband unless the circumstances are such as to justify the wife in living apart, or unless the husband has by his conduct held her out as having authority to pledge his credit (*d*).

A decree for judicial separation does not affect the liability of the husband under a contract made by the wife prior to the decree. In *Re Wingfield* (*e*), a solicitor was retained by a wife, in pursuance of her implied authority to pledge her husband's credit, to defend divorce proceedings instituted by him, and also to conduct an action of detinue against him, and it was held that the retainer was not determined by a decree for judicial separation, and that the husband was liable to the solicitor for costs incurred in pursuance of the retainer after as well as before the decree, but that he would not be liable on a retainer given by the wife subsequent to the decree.

### Article 13.

#### WHERE SEPARATED BY MUTUAL CONSENT.

Where husband and wife are separated by mutual consent, and there is an agreement between them as to her maintenance, she has no implied authority to pledge his credit so long as he duly complies with the terms of the agreement, whether she is

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(*c*) *Bird v. Jones*, 1828, 3 M. & R. 121. See also *Dennys v. Sargeant*, 1834, 6 C. & P. 419.

(*d*) *Wallis v. Biddick*, 1873, 22 W. R. 76.

(*e*) (1904) 2 Ch. 665; 73 L. J. Ch. 797, C. A.

adequately provided for or not (*f*); but if the terms of the agreement are not duly complied with by the husband, then she has implied authority to pledge his credit for necessaries suitable to her station in life (*g*).

Where husband and wife are separated by mutual consent, and there is no agreement between them as to her maintenance, she has implied authority to pledge his credit for necessaries suitable to her station in life, unless she has adequate separate means, or is provided with an adequate allowance, either by her husband or some other person (*h*).

Where the wife is permitted to have the custody of the children, necessaries for them are deemed to be necessaries for her (*i*).

*Effect of the husband's misconduct, where separated by mutual consent.*—In *Biffin v. Bignell*, 1862 (*k*), the Court of Exchequer laid down that, where a husband consents to a separation on condition that his wife shall accept a certain allowance, she has no implied authority to pledge his credit so long as the allowance is duly paid, even if it be inadequate, unless he has been guilty of such misconduct as to justify her in living apart without his consent; because, by not fulfilling the conditions on which his consent was given, she is, in effect, living apart without his consent. But

(*f*) *Eastland v. Burchell*, 1878, 47 L. J. Q. B. 500; 3 Q. B. D. 432; *Negus v. Forster*, 1882, 46 L. T. 675, C. A.

(*g*) *Beale v. Arabin*, 1877, 36 L. T. 249.

(*h*) *Johnston v. Sumner*, 1858, 27 L. J. Ex. 341; 3 H. & N. 261; 117 B. R. 769; *Harvey v. Norton*, 1840, 4 Jur. 42.

(*i*) *Rowlins v. Vandyke*, 1800, 3 Esp. 250.

(*k*) 31 L. J. Ex. 189; 7 H. & N. 877.

in *Negus v. Forster*, 1882 (*l*), where there had been an agreement for a separation with an allowance of 100*l.* a year, and the parties had resumed cohabitation, and then again separated, and the wife had subsequently obtained a judicial separation with alimony 180*l.* a year, on the ground of the husband's misconduct prior to the second separation, it was held by the Court of Appeal that' the 100*l.* a year having been regularly paid, the original separation deed was a good defence to an action for the price of necessaries supplied to the wife after the second separation but before the decree for judicial separation and alimony. And it would, therefore, seem that misconduct of the husband, combined with inadequacy of the wife's income, does not give her implied authority to pledge his credit, where the amount of such income has been expressly agreed upon, and is duly paid.

*Where no agreement as to maintenance.*—Where there has been no agreement as to the amount of her allowance or as to her maintenance, the liability of a husband, who consents to his wife living apart, for the price of necessaries supplied to her on his credit, depends upon whether she is adequately provided for or not. If he pays her an adequate allowance, she has no implied authority to pledge his credit (*m*), and he is not liable for the price of things supplied to her, even if the person supplying them has no notice of the allowance (*n*). So, he is not liable for things supplied to her, if he can show that she has adequate separate means (*o*), or that she receives adequate maintenance from

(*l*) 46 L. T. 675, C. A.

(*m*) *Mizen v. Pick*, 1838, 7 L. J. Ex. 153; 3 M. & W. 481; 49 R. R. 694; *Holder v. Cope*, 1846, 2 C. & K. 437; *Emmett v. Norton*, 1838, 8 C. & P. 506; 56 R. R. 848; *Hodgkinson v. Fletcher*, 1814, 4 Camp. 70; 15 R. R. 725.

(*n*) *Reve v. Conyngham*, 1847, 2 C. & K. 444; *Mizen v. Pick*, 1838, 7 L. J. Ex. 153; 3 M. & W. 481; 49 R. R. 694.

(*o*) *Lidlow v. Wilmot*, 1817, 2 Stark. 86; 19 R. R. 684.

some source, whether he supplies it or not (*p*). The question of adequacy is a question of fact for the jury. If they find that the allowance made by him is inadequate, and that she is not otherwise sufficiently provided for according to her station in life, she has implied authority to pledge his credit for suitable necessaries, though she may have acquiesced in the amount of the allowance (*q*).

#### Article 14.

##### WHERE LIVING APART WITHOUT THE HUSBAND'S CONSENT.

Where a wife leaves her husband without his consent, or lives apart from him contrary to his wishes, she has no implied authority to pledge his credit, unless he has been guilty of such misconduct as to justify her in so leaving him or living apart (*r*).

#### Article 15.

##### WHERE LIVING APART IN CONSEQUENCE OF HUSBAND'S MISCONDUCT, ETC.

Where a wife has been deserted by her husband (*s*), or has been turned away by him without adequate cause (*t*), or has left him in consequence

(*p*) *Clifford v. Laton*, 1827, 3 C. & P. 15; *Dixon v. Hurrell*, 1838, 8 C. & P. 717.

(*q*) *Hodgkinson v. Fletcher*, 1814, 4 Camp. 70; 15 R. R. 725.

(*r*) *Hindley v. Westmeath*, 1827, 6 B. & C. 200; 30 R. R. 290; *Johnston v. Sumner*, 1858, 27 L. J. Ex. 341; 3 H. & N. 261; 117 R. R. 769; *Swan v. Mathieson*, 1911, 103 L. T. 832.

(*s*) *Wilson v. Ford*, 1868, 37 L. J. Ex. 60; 1. R. 3 Ex. 63.

(*t*) *Harrison v. Grady*, 1865, 13 L. T. 369; *Forristall v. Lawson*, *Connelly v. Lawson*, 1876, 34 L. T. 903; *Thompson v. Hervey*, 1768, 4 Burr. 2177.

of misconduct on his part justifying her in so leaving him (*u*), and is living apart from him, it is an irrebutable presumption of law that she has authority to pledge his credit—

- (a) for necessaries suitable to her station in life, unless she is adequately provided for;
- (b) for costs reasonably incurred in taking proceedings against him (*x*); and
- (c) where she has been given the custody of the children by reason of his misconduct, for their maintenance and education, even if they are living with her contrary to his wishes (*y*).

Where a wife is separated from her husband under any of the circumstances specified in this article, he is bound in equity to repay money lent to her for, and expended in, the purchase of necessaries (*z*).

The authority referred to in this article is said to be an authority of necessity (*a*), and the husband is bound to pay for things ordered by the wife in the exercise thereof, even if

(*u*) *Houlston v. Smyth*, 1825, 3 Bing. 127; 28 R. R. 609.

(*x*) *Ottoway v. Humilton*, 1878, 47 L. J. C. P. 725; 3 C. P. D. 393, C. A.; *Wilson v. Ford*, *ante*, note (*s*). This does not extend to the costs of an indictment for assault: *Grinstell v. Godmond*, 1836, 6 L. J. K. B. 31; 1 N. & P. 168; 44 R. R. 573.

(*y*) *Bazeley* (or *Buseley*) *v. Forder*, 1868, 37 L. J. Q. B. 237; L. R. 3 Q. B. 559; *Collins v. Cory*, 1901, 17 T. L. R. 242.

(*z*) *Jenner v. Morris*, 1861, 30 L. J. Ch. 361; *Deare v. Soutten*, 1869, L. R. 9 Eq. 151; *Harris v. Lee*, 1718, 1 P. W. 482. *May v. Skey*, 1849, 16 Sim. 588, is overruled.

(*a*) *Johnston v. Sumner*, 1858, 27 L. J. Ex. 341; 3 H. & N. 261; 117 R. R. 769.



he gave the person supplying them express notice not to trust her (*b*). The fact that he makes her an allowance is no defence, if it is found by the jury to be inadequate (*c*). But if alimony has been decreed, and is duly paid, it will be presumed by the court to be sufficient (*d*).

*Costs of legal proceedings.*—Where a wife is turned away by her husband, or is compelled to leave him in consequence of his violence, and it is necessary to take proceedings to oblige him to keep the peace, he is liable for the costs of such proceedings, as between solicitor and client, even if he allows her an adequate separate maintenance (*e*). So, a wife has implied authority to pledge her husband's credit for costs, as between solicitor and client, reasonably incurred in the institution and prosecution of proceedings for divorce (*f*). And it has been held that he is liable for costs incurred by her in filing a petition for judicial separation, even if it be not proceeded with, provided there are reasonable grounds therefor (*g*). But in such cases the solicitor ought, before commencing proceedings, to make proper investigation and inquiry into all the circumstances; and he is not entitled to recover the costs from the husband in the absence of success unless he can show that there was at least great probability

(*b*) *Harris v. Morris*, 1801, 4 Esp. 41; 2 R. R. 786; and see Article 16, Illustration 3.

(*c*) *Baker v. Sampson*, 1863, 14 C. B. N. S. 383.

(*d*) *Willson v. Smyth*, 1831, 1 B. & Ad. 801. And see Article 12.

(*e*) *Shepherd v. Mackoul*, 1813, 3 Camp. 326; 14 R. R. 752; *Turner v. Rooks*, 1839, 8 L. J. Q. B. 211; 2 P. & D. 294; 50 R. R. 320; *Williams v. Fowler*, 1825, M'Clcl. & Y. 269.

(*f*) *Ottaway v. Hamilton*, 1878, 3 C. P. D. 393; 47 L. J. C. P. 725, C. A.; *Stocken v. Patrick*, 1873, 29 L. T. 507; *Re Wingfield*, (1904) 2 Ch. 665; 73 L. J. Ch. 797, C. A.

(*g*) *Rice v. Shepherd*, 1862, 12 C. B. N. S. 332; *Brown v. Ackroyd*, 1856, 25 L. J. Q. B. 193; 5 El. & Bl. 819; 103 R. R. 762; *Taylor v. Hailstone*, 1882, 52 L. J. Q. B. 101. But see *Cale v. James*, (1897) 1 Q. B. 418; 66 L. J. Q. B. 249.

of success (*h*). In *Wilson v. Ford* (*i*), where a husband had deserted his wife without cause, and left her without means of subsistence, it was held that she had implied authority to pledge his credit for the costs—(a) of a suit for restitution of conjugal rights; (b) of taking counsel's opinion as to whether a verbal promise of a settlement made by the husband at the time of the marriage could be enforced in equity; and (c) of consultations with her solicitor as to the best means of dealing with tradesmen who had supplied her with necessaries and were pressing her for money, and also with the landlord of a house in which she and her husband had lived, who was threatening to distrain for rent, upon furniture which had been hers before marriage.

*What degree of misconduct justifies a wife in leaving her husband.*—It was decided in *Horwood v. Heffer* (1811) (*k*) that no amount of ill-treatment, short of personal violence, or such as to induce a reasonable fear of personal violence, would entitle a wife to pledge her husband's credit after leaving his house without his consent. But in *Houliston v. Smyth* (1825) (*l*) it was laid down that such conduct as bringing a prostitute into the house, or threatening to confine the wife in a madhouse, was equivalent to turning her away. It is clear that such cruelty as renders it no longer safe for the wife to remain in the house (*m*), or such violent conduct as causes a reasonable apprehension of personal violence (*n*),

(*h*) *Re Hooper, Baylis v. Watkins*, 1864, 33 L. J. Ch. 300; *Walker v. Walker*, 1897, 76 L. T. 234; *Beer v. Beer*, 1906, 22 T. L. R. 367.

(*i*) 1868, L. R. 3 Ex. 63; 37 L. J. Ex. 60.

(*k*) 3 Taunt. 421.

(*l*) 3 Bing. 127; 28 R. R. 609; *Tempany v. Hakewill*, 1858, 1 F. & F. 438; 115 R. R. 936.

(*m*) *Emery v. Emery*, 1827, 1 Y. & J. 501; 30 R. R. 834; *Baker v. Sampson*, 1863, 14 C. B. N. S. 383; *Hodges v. Hodges*, 1796, 1 Esp. 441; 4 R. R. 889.

(*n*) *Brown v. Ackroyd*, 1856, 25 L. J. Q. B. 193; 5 El. & Bl. 819; 103 R. R. 762.

justifies her in leaving her husband, and living apart from him.

### Article 16.

#### EFFECT OF ADULTERY BY THE WIFE.

A husband is under no obligation to support his wife, and she has no implied or presumed authority to pledge his credit, whether they live together or not, and even if he has himself been guilty of misconduct, after she has committed adultery, unless he connived at or has condoned the offence (*o*). Provided, that if, being aware of her adultery, he continues to hold her out as his agent, he is liable to the same extent as if her authority had continued, with respect to any persons dealing with her on the faith of such holding out, without notice of the determination of her authority (*p*).

Where a husband connives at or has condoned his wife's adultery, her implied or presumed authority is not affected thereby (*q*).

#### *Illustrations.*

1. A husband committed adultery with a woman whom he brought to the house where he lived with his wife, and, after treating his wife with great cruelty, turned her out of doors. Then the wife committed adultery, after which she offered to return home, but her husband refused to receive her.

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(*o*) Illustrations 1 and 2. *Manby v. Scott*, 1660, 1 Lev. 4.

(*p*) Illustration 4.

(*q*) Illustration 3.

Held, that the husband was not liable for necessaries supplied to her after her adultery (*r*).

2. A husband turns his wife away without cause. She commits adultery. He is not liable for goods supplied to her after the adultery, even if the person supplying them has no notice of the adultery (*s*), and the goods are absolute necessaries (*t*).

3. A husband connives at his wife's adultery, and then turns her away. She has implied authority to pledge his credit for necessaries, and he is liable for the price thereof, even if he gave express notice to the person supplying them not to trust her (*u*). The same rule applies if a husband condones his wife's adultery, and subsequently turns her away (*x*).

4. A husband, knowing of his wife's adultery, permitted her to continue living in his house with the children. Held, that he was liable for the price of necessaries supplied to her by a tradesman who was ignorant of the circumstances (*y*).

### Article 17.

#### IMPLIED AUTHORITY TO ACKNOWLEDGE DEBTS FOR NECESSARIES.

Whenever a wife has authority to pledge her husband's credit, she has also implied authority to acknowledge on his behalf a debt incurred in

(*r*) *Govier v. Hancock*, 1796, 6 T. R. 603; 3 R. R. 271.

(*s*) *Emmett v. Norton*, 1838, 8 C. & P. 506; 56 R. R. 848; *Atkyns v. Pearce*, 1857, 26 L. J. C. P. 252; 2 C. B. N. S. 763; 109 R. R. 876.

(*t*) *Hardie v. Grant*, 1838, 8 C. & P. 512; *Cooper v. Lloyd*, 1859, 6 C. B. N. S. 519; 120 R. R. 253.

(*u*) *Wilson v. Glossop*, 1888, 20 Q. B. D. 354; 57 L. J. Q. B. 161, C. A.

(*x*) *Harris v. Morris*, 1801, 4 Esp. 41; 2 R. R. 786; *Robinson v. Gosnold*, 1703, 6 Mod. 171.

(*y*) *Norton v. Fazan*, 1798, 1 B. & P. 226; 4 R. R. 785.

pursuance thereof, and such an acknowledgment, if it is in writing and signed by her, interrupts the operation of the Statute of Limitations (*z*).

### Article 18.

#### HUSBAND NOT LIABLE UNLESS CREDIT GIVEN TO HIM.

No husband is liable for the price of necessaries supplied to his wife, whether they live together or not, where exclusive credit is given to the wife (*a*), or to some third person, by the person supplying them.

Thus, where a wife, separated from her husband with his consent, lived with her uncle, and ordered necessaries from a tradesman who gave credit to the uncle, and whose former bills for goods supplied to her had been paid by the uncle, it was held that the husband was not liable, though he did not make his wife any allowance (*b*). But the mere fact that the things are booked in the wife's name is not conclusive evidence of an intention to give credit to her alone. The jury must be satisfied that, at the time when the contract was made, the person supplying the things intended to give credit to her to the exclusion of her husband (*c*). If, however, the wife is sued to judgment, that is conclusive evidence of an election to give exclusive credit to her (*d*).

(*z*) *Gregory v. Parker*, 1808, 1 Camp. 394; 10 R. R. 712; 9 Geo. IV. c. 14, s. 6; 19 & 20 Vict. c. 97, s. 13. But see *Ingram v. Little*, 1883, 1 C. & E. 186.

(*a*) *Bentley v. Griffin*, 1814, 5 Taunt. 356; *Metcalfe v. Shaw*, 1811, 3 Camp. 22; 13 R. R. 740.

(*b*) *Harvey v. Norton*, 1840, 4 Jur. 42. See also *Reeve v. Conyngham*, 1847, 2 C. & K. 444.

(*c*) *Jewsbury v. Newbold*, 1857, 26 L. J. Ex. 247; 112 R. R. 927.

(*d*) Article 96, Illustration 7.

## Article 19.

## AUTHORITY PRESUMED FROM COHABITATION AS MAN AND WIFE.

Where a man lives with a woman as his wife, she has authority to pledge his credit, during the continuance of the cohabitation, to the same extent as if she were legally married to him (*e*).

Where there is no cohabitation, the mere fact that a man permits a woman to assume his name is not sufficient to raise a presumption of authority to pledge his credit (*f*). But if they live together as man and wife, he is liable for the price of necessaries supplied to her on his credit, even if the tradesman knew when he supplied them that they were not married (*e*). This presumed authority determines on a separation, and the mere fact that he had represented her to be his wife does not render him liable for the price of necessaries supplied to her after the separation (*g*). If, however, he held her out to third persons as his agent, they are entitled to deal with her as such, and to charge him accordingly, until they receive notice that the connection has determined. (*h*).

(*e*) *Watson v. Threlkeld*, 1794, 2 Esp. 637; 5 R. R. 760; *Ryan v. Sams*, 1848, 12 Q. B. 460; 17 L. J. Q. B. 271; 76 R. R. 312; *Blades v. Free*, 1829, 9 B. & C. 167; 32 R. R. 620.

(*f*) *Gomme v. Franklin*, 1859, 1 F. & F. 465; 115 R. R. 941.

(*g*) *Munro v. De Chemant*, 1815, 4 Camp. 215.

(*h*) *Ryan v. Sams*, 1848, 12 Q. B. 460; 17 L. J. Q. B. 271; 76 R. R. 312.

## Article 20.

CHILD NO IMPLIED AUTHORITY TO PLEDGE PARENT'S  
CREDIT.

Children have no implied authority, as such, to pledge the credit of their parents, even for the supply of necessaries.

In the absence of proof of an express or implied contract on his part, a father is no more liable than a stranger for debts incurred by his children without his authority; and the obligation to maintain his children affords no legal inference of a promise to pay for necessaries supplied to them (*i*). To render a parent liable for things supplied to his child, the person supplying them must give some evidence of his authority or assent (*k*). Where a minor has ordered suitable necessaries, and some evidence of authority has been given, it is a question for the jury whether the circumstances of the case are such as to justify them in inferring that they were ordered with the father's authority (*l*). In such cases, slight evidence of authority is sufficient to establish a case for the jury (*l*).

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(*i*) *Shelton v. Springett*, 1851, 11 C. B. 452; *Mortimer v. Wright*, 1840, 6 M. & W. 482; 55 R. R. 704; *Crantz v. Gill*, 1796, 2 Esp. 471; 5 R. R. 746.

(*k*) *Rolfe v. Abbott*, 1833, 6 C. & P. 286.

(*l*) *Law v. Wilkins*, 1837, 6 A. & E. 718; *Baker v. Keen*, 1819, 2 Stark. 501.

## CHAPTER IV.

## APPOINTMENT OF AGENTS.

AN agent may be appointed and his authority conferred by a power of attorney, a formal instrument under seal; by writing; or merely by word of mouth.

## Article 21.

## AUTHORITY TO EXECUTE A DEED.

Where an agent is authorized to execute a deed on behalf of his principal, his authority must be given by an instrument under seal (*a*), except where the deed is executed in the name and presence of the principal and the authority to execute it is given by him there and then, in which case it may be given by word of mouth or by signs (*b*).

So, a partner cannot bind his firm or the other partners by deed, unless expressly authorized under seal to do so (*c*), except where the deed is executed by the authority and in the presence of all the partners (*d*).

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(*a*) *Berkeley v. Hardy*, 1826, 5 B. & C. 355; 29 R. R. 261.

(*b*) *Rea v. Longnor*, 1833, 4 B. & Ad. 647.

(*c*) *Harrison v. Jackson*, 1797, 7 T. R. 207; 5 R. R. 432.

(*d*) *Ball v. Dunsterville*, 1791, 4 T. R. 313; 2 R. R. 394; *Burn v. Barn*, 1798, 3 Ves. 578.



## Article 22.

## APPOINTMENT IN OTHER CASES.

Subject to the provisions of Article 23, and except where otherwise expressly provided by or pursuant to any statute, or by the terms of the power or authority (if any) under which the agent is appointed, an agent may be appointed either by deed, by writing, or merely by word of mouth, for any purpose except the execution of a deed.

An agent may be appointed by word of mouth, even where he is authorized to enter into a contract required by statute to be in writing, as in the case of contracts within the 4th section of the Statute of Frauds, or the 4th section of the Sale of Goods Act, 1893 (*e*). And letters written by an agent within the scope of his authority, and signed by him, are a sufficient memorandum to satisfy the Statute of Frauds if they contain the terms of an agreement entered into by his principal, or refer to other documents containing such terms, although the agent was not specifically authorized to sign a memorandum as a record of the agreement (*f*). So, authority to subscribe the name of the principal to the memorandum of association of a joint stock company, or to the instrument of dissolution of a building society, may be given ver-

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(*e*) *Mortlock v. Buller*, 1804, 10 Ves. 311; 7 R. R. 417; *Coles v. Trecothick*, 1804, 9 Ves. 234, 249a; 7 R. R. 167; *Deverell v. Bolton*, 1812, 18 Ves. 509; *Graham v. Musson*, 1839, 7 Scott, 769, 778; 8 L. J. C. P. 324; 50 R. R. 807; *Heard v. Pilley*, 1869, L. R. 4 Ch. 548; 38 L. J. Ch. 718; *Clinan v. Cooke*, 1802, 1 Sch. & Lef. 22; 9 R. R. 3.

(*f*) *Griffiths Cycle Corpn. v. Humber*, (1899) 2 Q. B. 414; 68 L. J. Q. B. 959, C. A.; *Daniels v. Trefusis*, (1914) 1 Ch. 788; 83 L. J. Ch. 579.

bally (*g*). The first three sections of the Statute of Frauds expressly required that an agent appointed for any of the purposes of those sections should be authorized in writing, but the 8 & 9 Viet. c. 106, now requires a deed for those purposes, and it is therefore necessary that such an agent should be appointed by deed.

*Agent to purchase land.*—A contract for the purchase of land made by an agent, as such, vests the equitable estate in the principal, and the contract may be enforced by the principal as against both the vendor and the agent, even if the agent was appointed orally, provided that the legal estate has not been conveyed to him (*h*). In *Bartlett v. Pickersgill* (*i*), it was held that if the land has been conveyed to the agent, so as to vest the legal estate in him, he is a trustee for the principal, and is entitled to take advantage of the 7th section of the Statute of Frauds, which provides that all declarations or creations of trusts of any lands, tenements or hereditaments shall be void, unless proved by writing. This decision was, however, criticised in *Heard v. Pilley* (*k*), and though recognised as good law in *James v. Smith* (*l*), was disapproved by the Court of Appeal in *Rochefoucauld v. Boustead* (*m*), on the ground that it is fraudulent for the agent to take advantage of the statute in such a case, and must therefore be considered overruled.

*Retainer of Solicitor.*—A solicitor may be appointed by word of mouth to institute an action or suit, but the burden of distinctly proving that he was authorized lies in all cases

(*g*) *Re Whitley; Ex p. Callan*, 1886, 32 Ch. D. 337; 55 L. J. Ch. 540, C. A.; *Dennison v. Jeffs*, (1896) 1 Ch. 611; 65 L. J. Ch. 435.

(*h*) *Heard v. Pilley*, 1869, L. R. 4 Ch. 548; 38 L. J. Ch. 718; *Cave v. Mackenzie*, 1877, 46 L. J. Ch. 564.

(*i*) 1785, 1 Cox, 15; 1 R. R. 1.

(*k*) *Supra*, note (*h*).

(*l*) (1891) 1 Ch. 384.

(*m*) (1897) 1 Ch. 196; 66 L. J. Ch. 74.

upon him, and therefore, as a general rule, he ought, for his own protection, to require a written retainer (*n*).

### Article 23.

#### APPOINTMENT BY CORPORATIONS.

The appointment of an agent by a corporation must be under its common seal (*o*). Provided, that this rule does not apply to trading corporations (*p*) or joint stock companies (*q*), or industrial or provident societies (*r*), nor in any case where its application would cause very great inconvenience, or tend to defeat the very purpose for which the corporation was created (*s*).

Thus, it has been held that the engagement, by a board of guardians, of a clerk to the master of a workhouse must be

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(*n*) *Lord v. Kellett*, 1833, 2 Myl. & K. 1; *Wiggins v. Peppin*, 1837, 2 Beav. 403; 50 R. R. 217; *Allen v. Bone*, 1841, 4 Beav. 493; *Pinner v. Knights*, 1843, 6 Beav. 174; *Re Manby*, 1856, 26 L. J. Ch. 313; *Maries v. Maries*, 1853, 23 L. J. Ch. 154; *Owen v. Ord*, 1828, 3 C. & P. 349; *Tabbemor v. Tabbemor*, 1836, 2 Keen, 679; *Atkinson v. Abbott*, 1855, 3 Drew. 251; 106 R. R. 329.

(*o*) *Kidderminster v. Hardwicke*, 1873, L. R. 9 Ex. 13; 43 L. J. Ex. 9; *Reg. v. Stamford*, 1844, 6 Q. B. 433; 66 R. R. 449; *Smith v. Cartwright*, 1851, 6 Ex. 927; 20 L. J. Ex. 401.

(*p*) *South of Ireland Colliery Co. v. Waddle*, 1869, L. R. 4 C. P. 617; 38 L. J. C. P. 338, Ex. Ch. affirming L. R. 3 C. P. 463; *Henderson v. Australian Steam Navigation Co.*, 1855, 24 L. J. Q. B. 322; 5 El. & Bl. 409; 103 R. R. 538.

(*q*) 8 Ed. VII. c. 69, s. 76; 8 & 9 Vict. c. 16, s. 97. See, also, 23 & 24 Vict. c. 125, s. 20, as to certain Metropolitan Gas Companies.

(*r*) 56 & 57 Vict. c. 39, s. 35.

(*s*) *Church v. Imperial Gaslight Co.*, 1838, 7 L. J. Q. B. 118; 6 A. & E. 846; 45 R. R. 638; *Mayor of Ludlow v. Charlton*, 1840, 6 M. & W. 815, 822; 55 R. R. 794; *Clarke v. Cuckfield*, 1852, 21 L. J. Q. B. 349; 91 R. R. 891; *Lawford v. Billericay R. C.*, (1903) 1 K. B. 772; 72 L. J. K. B. 554, C. A.

under seal, to bind the board of guardians (*t*). So, the appointment of a solicitor to a municipal corporation must be under seal or by act of record (*u*). Where an attorney was retained by a municipal corporation to oppose a bill in parliament, it was held that, in the absence of a retainer under seal, he was not entitled to recover his costs (*x*).

*Exemptions.*—The common law rule was that all contracts by corporations must be under their common seal. But it is now settled that corporations may bind themselves by parol, whenever the acts in question are so frequently recurring, or so insignificant, that the affixing of the seal would be a great inconvenience (*y*); and that trading corporations are bound by their parol contracts, without reference to their frequency, or to the magnitude of the subject-matter thereof, whenever the contracts are within the scope of the objects of incorporation (*z*). A company registered under the Companies (Consolidation) Act, 1908 (*a*), or governed by the Companies Clauses Act, 1845 (*b*), or an industrial or provident society (*c*), may appoint an agent by parol for any purpose which is *intra vires*, except the execution of a deed.

(*t*) *Austin v. Guardians of Bethnal Green*, 1874, L. R. 9 C. P. 91; 43 L. J. C. P. 100. See also *Cope v. Thames Haven Dock, &c. Co.*, 1849, 3 Ex. 841; 77 R. R. 859; *Dyte v. St. Pancras*, 1872, 27 L. T. 342.

(*u*) *Arnold v. Mayor of Poole*, 1842, 4 M. & G. 860; 12 L. J. C. P. 97; 61 R. R. 664; *Phelps v. Upton Snodsbury*, 1885, 1 T. L. R. 425.

(*x*) *Sutton v. Spectacle Makers' Co.*, 1864, 10 L. T. 411. Comp. *Hodge v. Matlock Bath U. C.*, 1910, 26 T. L. R. 617; 27 T. L. R. 129, C. A.

(*y*) See note (*s*), *supra*, p. 43.

(*z*) *South of Ireland Colliery Co. v. Waddle*, 1869, L. R. 4 C. P. 617; 38 L. J. C. P. 338; *Henderson v. Australian Steam Navigation Co.*, 1855, 24 L. J. Q. B. 322; 5 El. & Bl. 409; 103 R. R. 538. See also *Reg. v. Cumberland*, 1848, 5 D. & L. 431; 79 R. R. 858.

(*a*) 8 Ed. VII. c. 69, s. 76.

(*b*) 8 & 9 Vict. c. 16, s. 97.

(*c*) 56 & 57 Vict. c. 39, s. 35.

*Holding out.*—Where a corporation holds out or permits a person to appear as its agent, it is bound by his acts as such, with respect to persons dealing with him in good faith and without notice of any informality, though he has not been formally appointed. Thus, where an attorney, who had not been appointed under seal, appeared in an action for a corporation to the knowledge of the directors, it was held that the corporation was bound by his acts as its attorney (*d*).

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(*d*) *Faviell v. Eastern Counties Rail. Co.*, 1848, 2 Ex. 344; 17 L. J. Ex. 297; 76 R. R. 615. And see Article 88, Illustrations 13 and 14.

## CHAPTER V.

## RATIFICATION OF UNAUTHORIZED ACTS.

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Article 24.

## RATIFICATION EQUIVALENT TO PREVIOUS AUTHORITY.

WHERE an act is done in the name or professedly on behalf of a person without his authority by another person assuming to act as his agent, the person in whose name or on whose behalf the act is done may, by ratifying the act, make it as valid and effectual, subject to the provisions of this chapter, as if it had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all (*a*).

*Illustrations.*

1. A. enters into and signs a written contract on behalf of B., without authority. B. subsequently ratifies the contract. A. is deemed to have been B.'s duly authorized agent within the meaning of the 4th and 17th sections of the Statute of

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(*a*) *Wilson v. Tunman*, 1843, 6 M. & G. 236; 64 R. R. 770; *Bird v. Brown*, 1850, 4 Ex. 786; 19 L. J. Ex. 154; 80 R. R. 775; *Richardson v. Oxford*, 1861, 2 F. & F. 449.

Frauds, and of the 4th section of the Sale of Goods Act, 1893 (*b*).

2. An agent, without authority, insures goods on behalf of his principal. The principal ratifies the policy. The policy is as valid as if the agent had been expressly authorized to insure the goods (*c*).

3. A public agent does an act in excess of his authority. The Crown ratifies the act. The act is deemed to be an act of State (*d*).

### Article 25.

#### WHAT ACTS MAY BE RATIFIED.

Every act, whether lawful or unlawful (*e*), which is capable of being done by means of an agent, except an act which is in its inception void (*f*), is capable of ratification by the person in whose name or on whose behalf it is done.

#### Illustrations.

1. A., on B.'s behalf, but without his authority, purchases from C. a chattel which C. has no right to sell, under such circumstances that the purchase of the chattel is a conversion.

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(*b*) *Maclean v. Dunn*, 1828, 1 M. & P. 761; 29 R. R. 714; *Soames v. Spencer*, 1822, 1 D. & R. 32; 24 R. R. 631.

(*c*) *Wolff v. Horncastle*, 1798, 1 B. & P. 316; 4 R. R. 808; *Williams v. North China Ass. Co.*, 1876, 1 C. P. D. 757, C. A.

(*d*) *Buron v. Denman*, 1848, 2 Ex. 167; 76 R. R. 554; *Secretary of State for India v. Kamachee Boye Sahaba*, 1859, 7 Moo. Ind. App. 476, P. C.

(*e*) Illustrations 1, 2, and 5; *Hull v. Pickersgill*, 1819, 1 Brod. & B. 282; 21 R. R. 598; *Wilson v. Tunman*, 1843, 6 M. & G. 236; 64 R. R. 770; Article 30, Illustration 10.

(*f*) Illustrations 6 and 7; *Spackman v. Evans*, 1868, L. R. 3 H. L. 171, 244, H. L.; *Banque Jacques Cartier v. Banque d'Epargne*, 1887, 13 App. Cas. 111; 57 L. J. P. C. 42, P. C.

B. ratifies the purchase. B. is guilty of converting the chattel (*g*).

2. A., an agent of a corporation, assaults B. on its behalf. The corporation ratifies the assault. The corporation is civilly liable to B. for the assault (*h*).

3. A shipmaster unnecessarily, and without the authority of the owners, sells his ship. The owners may ratify the sale (*i*), which then will become valid and binding (*i*).

4. A., a solicitor, at the request of B., the holder of a bill of exchange, sues on the bill in the name of C. without C.'s knowledge or authority. C. ratifies the action. A. is entitled to recover the amount of the bill (*k*).

5. A. distrains B.'s goods in the name of B.'s landlord, but without the landlord's authority. The landlord may ratify the distraint, and it is then deemed to have been levied by his authority (*l*).

6. A. signs an instrument in B.'s name without his authority and with intent to defraud. B. cannot ratify the signature, because it is a forgery and is void in its inception (*m*). But if B., knowing of the forgery, by his conduct induces a third person to believe that the signature is his, and such third person acts on that belief to his detriment, B. will be estopped from denying that it is his signature in any action between him and such third person (*n*).

(*g*) *Hilberry v. Hatton*, 1864, 33 L. J. Ex. 190; 2 H. & C. 822.

(*h*) *Eastern Counties Rail. Co. v. Broom*, 1851, 6 Ex. 314; 20 L. J. Ex. 196; 86 R. R. 310, Ex. Ch.

(*i*) *The Australia*, 1859, 13 Moo. P. C. C. 132.

(*k*) *Ancona v. Marks*, 1862, 31 L. J. Ex. 163; 7 H. & N. 686.

(*l*) *Whitehead v. Taylor*, 1839, 10 A. & E. 210; 50 R. R. 385.

(*m*) *Brook v. Hook*, 1871, L. R. 6 Ex. 89; 40 L. J. Ex. 51. See note (*n*).

(*n*) *M'Kenzie v. British Linen Co.*, 1881, 6 A. C. 82, H. L. In this case there is a dictum of Lord Blackburn to the effect that a forgery may be ratified, so as to make the person whose name is forged civilly responsible on the instrument, though not to discharge the forger from criminal liability; and I believe it has been so decided in America.



7. The directors of a company enter into a contract which is not within the scope of the memorandum of association. The contract cannot be ratified by the company, even with the assent of every shareholder, because it is *ultra vires*, and therefore void (*o*). So, a payment by the directors of a company, of dividends out of the capital, is incapable of ratification by the shareholders (*p*). But a contract entered into on a company's behalf by the directors, which is within the scope of the memorandum, but is beyond the powers of the directors under the articles, of association, may be ratified by the company (*q*).

### Article 26.

#### WHO MAY RATIFY.

The only person who has power effectively to ratify an act is the person in whose name or on whose behalf the act was professedly done (*r*), and it is necessary that he should have been in existence (*s*) and capable of being ascertained (*t*) at the

See also *Bank of Ireland v. Evans' Trustees*, 1855, 5 H. L. Cas. 389; 101 R. R. 218; and *Coles v. Bank of England*, 1839, 10 A. & E. 437. But the wording of the 24th section of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), seems to support the opinion of the majority of the judges who decided *Brook v. Hook* (cited above), and I have therefore ventured to adopt that opinion as law, though the decision itself may be supported on other grounds.

(*o*) *Ashbury Carriage Co. v. Riche*, 1875, L. R. 7 H. L. 653; 44 L. J. Ex. 185, H. L.

(*p*) *Re Exchange Banking Co., Flitcroft's case*, 1882, 21 Ch. D. 519; 52 L. J. Ch. 217, C. A.

(*q*) *Irvine v. Union Bank of Australia*, 1877, 2 App. Cas. 366; 46 L. J. P. C. 87; *Ashbury Carriage Co. v. Riche*, *supra*.

(*r*) Illustrations 1 to 5. *Wilson v. Barker*, 1833, 4 B. & Ad. 614; *Royal Albert Hall v. Winchelsea*, 1891, 7 T. L. R. 362, C. A.

(*s*) Illustration 4.

(*t*) *Watson v. Swann*, 1862, 31 L. J. C. P. 210; 11 C. B. N. S. 756.

time when the act was done; but it is not necessary that he should be known, either personally or by name, to the person doing the act (*u*).

*Illustrations.*

1. A sheriff, acting under a valid writ of execution, wrongfully seizes goods which are not the property of the debtor. The execution creditor cannot, by becoming a party to an interpleader issue or otherwise, ratify the act of the sheriff so as to render himself liable for the wrongful seizure, because the act was not done by the sheriff on his behalf, but in performance of a public duty (*x*).

2. A. enters into an agreement professedly on behalf of B.'s wife and C. B. cannot ratify the agreement so as to give him a right to sue upon it jointly with his wife and C. (*y*).

3. A. is authorized to buy wheat on the joint account of himself and B., with a certain limit as to price. A., intending to buy on the joint account of himself and B., and expecting that B. will ratify the contract, but not disclosing such intention to the seller, enters into a contract in his own name to buy at a price in excess of the limit. B. cannot ratify the contract (*z*).

4. The promoters of a prospective company enter into a contract on behalf of the company before its incorporation. The company cannot ratify the contract, because it was not

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(*u*) Illustration 6.

(*x*) *Wilson v. Tunman*, 1843 6 M. & G. 236; 64 R. R. 770; *Woollen v. Wright, Wright v. Woollen*, 1862, 31 L. J. Ex. 513; 1 H. & C. 554, Ex. Ch.; comp. *Walker v. Hunter*, 1845, 15 L. J. C. P. 12; 2 C. B. 324.

(*y*) *Saunderson v. Griffiths*, 1826, 5 B. & C. 909; 53 R. R. 161; *Heath v. Chilton*, 1844, 12 M. & W. 632; 67 R. R. 447.

(*z*) *Kighley v. Durant*, (1901) A. C. 240; 70 L. J. K. B. 622, H. L.

in existence at the time when the contract was made (a). The company may, of course, make a new contract on the same terms as the old (b), or may incur an equitable liability by reason of the perception of a benefit under the contract (c), or on the doctrine of part performance (d), provided that the contract is not *ultra vires* (e); but it cannot ratify the contract.

5. A. contracts on behalf of a volunteer corps with B., both parties thinking that the corps as an entity may be bound. The contract cannot be ratified by individual members of the corps, because it was not made on their behalf as individuals (f).

6. A. effects an insurance on goods on behalf, generally, of every person interested. Any person interested in the goods may subsequently ratify the insurance so far as concerns his interest, and the underwriters will then be bound by the policy to that extent (g). So, a person may act on behalf

(a) *Kelner v. Baxter*, 1886, L. R. 2 C. P. 174; 36 L. J. C. P. 94; *Re Empress Engineering Co.*, 1880, 16 Ch. Div. 125, C. A.; *Re Northumberland Avenue Hotel Co.*, 1886, 33 Ch. Div. 16, C. A.; *Re Rotherham Alum and Chemical Co.*, 1883, 25 Ch. Div. 103; 53 L. J. Ch. 290, C. A.; *Scott v. Ebury*, 1867, L. R. 2 C. P. 255; 36 L. J. C. P. 161; *Re Dale and Plant*, 1889, 61 L. T. 206; *Melhado v. Porto Alegre, &c. Rail. Co.*, 1874, L. R. 9 C. P. 503; 43 L. J. C. P. 253; *Star Corn Millers' Co. v. Moore*, 1886, 2 T. L. R. 751, C. A.; *North Sydney Investment Co. v. Higgins*, (1899) A. C. 263; 68 L. J. P. C. 42, P. C.; *Natal Land, &c. Co. v. Pauline, &c. Syndicate*, (1904) A. C. 120; 73 L. J. P. C. 22, P. C.

(b) *Howard v. Patent Ivory Co.*, 1888, 38 Ch. Div. 156; 57 L. J. Ch. 878.

(c) *Touche v. Metropolitan Warehousing Co.*, 1871, L. R. 6 Ch. 671; *Re Dale and Plant*, 1889, 61 L. T. 206; *Re English and Colonial Produce Co.*, (1906) 2 Ch. 435; 75 L. J. Ch. 831, C. A.

(d) *Howard v. Patent Ivory Co.*, *supra*; *Re Dale and Plant*, *supra*.

(e) *Preston v. L. M. & N. Rail.*, 1856, 5 H. L. Cas. 605; 25 L. J. Ch. 421; 101 R. R. 287; *Shrewsbury v. N. S. Rail.*, 1866, L. R. 1 Eq. 593; 35 L. J. Ch. 156.

(f) *Jones v. Hope*, 1880, 3 T. L. R. 247, n., C. A.

(g) *Hagedorn v. Oliverson*, 1814, 2 M. & S. 485; 15 R. R. 317. But

of an heir, or an administrator, or the owner of particular property, whoever he may be, though unascertained and unknown to him, and when ascertained, the person on whose behalf the act was done may ratify it (*h*), provided that he was capable of being ascertained, and was contemplated by the person doing the act at the time when it was done (*i*).

### Article 27.

#### CIRCUMSTANCES UNDER WHICH, AND WITHIN WHAT TIME, RATIFICATION CAN TAKE PLACE.

Ratification can only take place in accordance with and subject to the following rules and qualifications:—

- (1) Where it is essential to the validity of an act that it should be done within a certain time, the act cannot be ratified after the expiration of that time, to the prejudice of any third person (*k*).
- (2) Where an act, not being a contract, would, if it had been previously authorized, have imposed a duty on any third person, the ratification of the act cannot, of itself, impose such duty on such third person, or render him liable as for non-performance or breach thereof (*l*).

see *Boston Fruit Co. v. British and Foreign Marine Ins. Co.*, (1906) A. C. 336; 75 L. J. K. B. 537, H. L.

(*h*) *Lyell v. Kennedy*, 1889, 14 App. Cas. 437; 59 L. J. Q. B. 268, H. L.; *Foster v. Bates*, 1843, 1 D. & L. 400; 67 R. R. 311.

(*i*) *Watson v. Swann*, 1862, 31 L. J. C. P. 210; 11 C. B. N. S. 756.

(*k*) Illustrations 1 to 3. *Lord Audley's case*, Cro. Eliz. 561.

(*l*) Illustrations 4 to 6.

- (3) Where an act is done which, if not previously authorized nor subsequently ratified by the person on whose behalf it is done, would be a wrongful act on the part of the person doing it, the person on whose behalf it is done, in order by ratification to justify it, must ratify it at a time when he might lawfully do it himself (*m*); but the fact that before the ratification an action for the wrong has been commenced against the person doing the act does not affect the validity of the ratification (*n*).
- (4) A payment cannot be ratified after the money paid has been returned to the person who paid it (*o*); but the mere fact that the person on whose behalf a payment is made, at first repudiates it, does not prevent him from subsequently ratifying it (*p*).
- (5) The ratification of a contract must take place within a reasonable time after the contract is made, and before the time, if any, fixed for the commencement of the performance thereof by the other contracting party, in order to render it binding upon him (*q*). But the mere fact that the person on whose

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(*m*) *Bird v. Brown*, 1850, 4 Ex. 786; 19 L. J. Ex. 154; 80 R. R. 775.

(*n*) Illustration 7.

(*o*) Illustration 8.

(*p*) *Simpson v. Eggington*, 1855, 10 Ex. 845; 102 R. R. 867.

(*q*) *Metropolitan Asylum Board v. Kingham*, 1890, 6 T. L. R. 217.

behalf a contract is made refuses, at first, to recognize it (*r*), or that the other contracting party repudiates it (*s*), does not, of itself, affect the validity of a subsequent ratification.

A contract of marine (*t*), but not of fire (*u*), insurance may be effectively ratified by the owner of the property insured, after the loss of the property, even if he has notice of the loss at the time of the ratification.

Where an offer is made to an agent, and is accepted by him without authority, the circumstance that the person who made the offer gives notice to the principal of the withdrawal thereof, does not, of itself, prevent the principal from subsequently ratifying the acceptance, and thereby making the contract binding on the person who made the offer (*x*).

#### *Illustrations.*

1. A., without the authority of the landlord, gives a tenant notice to quit. The notice cannot be made binding on the tenant by the landlord's ratification after the time for giving notice has expired (*y*).

(*r*) *Soames v. Spencer*, 1822, 1 D. & R. 32; 24 R. R. 631.

(*s*) *Re Tiedemann*, (1899) 2 Q. B. 66; 68 L. J. Q. B. 852. Illustration 9. But see note (*h*), p. 56.

(*t*) *Williams v. North China Assurance Co.*, 1876, 1 C. P. D. 757, C. A.; *Cory v. Patton*, 1874, L. R. 9 Q. B. 577; 43 L. J. Q. B. 181.

(*u*) *Grover v. Mathews*, (1910) 2 K. B. 401; 79 L. J. K. B. 1025.

(*x*) Illustration 9. But see note (*h*), p. 56.

(*y*) *Doe d. Mann v. Walters*, 1830, 10 B. & C. 626; 34 R. R. 522;

2. It is agreed between A. and B., who are partners, that on the death of either of them the survivor shall have the option of purchasing the share of the deceased upon giving notice to his executors within three months after the death. A. dies, and within three months after his death, C., on B.'s behalf, but without his authority, gives notice to the executors of B.'s intention to exercise the option. Such notice cannot be ratified after the expiration of the three months so as to bind the executors (*z*).

3. The agent of a consignor of goods, without the authority of his principal, gave notice of stoppage *in transitu* on the principal's behalf. The goods afterwards arrived at their destination, and were formally demanded by the trustee in bankruptcy of the consignee. It was held that the consignor could not subsequently ratify the stoppage *in transitu* and so divest the property in the goods, which had in the meantime vested in the consignee's trustee in bankruptcy (*a*).

4. A., being indebted to B., tenders the amount of the debt. Subsequently, C. demands the debt in B.'s name and on his behalf, but without his authority. B. cannot ratify the demand so as to defeat A.'s plea of tender (*b*).

5. A. has possession of goods belonging to B. C. demands the goods on B.'s behalf, but without his authority. B. cannot ratify the demand so as to entitle him to maintain an action against A. for conversion of the goods (*c*).

6. The owner of a ship pledges a policy of insurance thereon. The pledgee, without the authority of the owner, gives notice of abandonment to the underwriters. The owner

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*Doe d. Lyster v. Goldwin*, 1841, 2 Q. B. 143; 57 R. R. 621; *Right d. Fisher v. Cuthell*, 1804, 5 East, 491; 7 R. R. 752. The earlier case of *Goodtitle v. Woodward*, 1819, 3 B. & A. 689, must, to this extent, be considered overruled.

(*z*) *Dibbins v. Dibbins*, (1896) 2 Ch. 348; 65 L. J. Ch. 724.

(*a*) *Bird v. Brown*, 1850, 4 Ex. 786; 80 R. R. 775.

(*b*) *Coles v. Bell*, 1808, 1 Camp. 478, n.; 10 R. R. 371; *Coore v. Callaway*, 1794, 1 Esp. 115.

(*c*) *Solomons v. Dawes*, 1794, 1 Esp. 83.

cannot ratify the notice of abandonment so as to render the underwriters liable as for a constructive total loss (*d*).

7. An agent, after the death of his principal, distrained in the principal's name for rent due. Held, that the executor might ratify the distress, and so justify the agent, although an action was at the time of the ratification pending against the agent for the trespass, and although the distress was levied before probate (*e*). So, where an agent, after his principal's death, sold the principal's property professedly on behalf of the estate, it was held that the person who was subsequently granted letters of administration might ratify the sale and recover the price (*f*). The title of an executor or administrator relates back to the time of the death of the deceased.

8. A., without B.'s authority, pays a debt owing by B. The creditor, upon discovering that A. was not authorized to pay the debt, returns the money to him. B. cannot subsequently ratify or take advantage of the payment (*g*).

9. A. made an offer to B., the managing director of a company, and it was accepted by him on the company's behalf. B. had no authority to accept the offer. A. then gave the company notice that he withdrew his offer, and the company subsequently ratified B.'s unauthorized acceptance. Held, by the Court of Appeal, that the maxim "*omnis ratihabitio retrotrahitur et mandato priori æquiparatur*" applied, and that the ratification dated back to the time of the acceptance, rendering the withdrawal of the offer inoperative. Specific performance decreed against A. (*h*).

(*d*) *Jardine v. Leathley*, 1863, 32 L. J. Q. B. 132; 3 B. & S. 700.

(*e*) *Whitehead v. Taylor*, 1839, 10 A. & E. 210; 50 R. R. 385.

(*f*) *Foster v. Bates*, 1843, 12 M. & W. 226; 13 L. J. Ex. 88; 67 R. R. 311.

(*g*) *Walter v. James*, 1871, L. R. 6 Ex. 124; 40 L. J. Ex. 104.

(*h*) *Bolton Partners v. Lambert*, 1888, 41 Ch. Div. 295; 58 L. J. Ch. 425, C. A.; *Re Portuguese Copper Mines, Limited, Ex p. Badman, Ex p. Bosanquet*, 1890, 45 Ch. Div. 16; *Re Tiedemann*, (1899) 2 Q. B. 66; 68 L. J. Q. B. 852. These cases are of doubtful authority, the



## Article 28.

## CONDITIONS NECESSARY FOR RATIFICATION.

In order that a person may be deemed to ratify an act done without his authority, it is necessary that, at the time of the ratification, he should have full knowledge of all the material circumstances under which the act was done (*i*), unless he intends to ratify the act, and take the risk, whatever the circumstances may have been (*k*). But it is not necessary that he should have knowledge of the legal effect of the act (*l*), or of collateral circumstances affecting the nature thereof (*m*).

*Illustrations.*

1. An agent wrongfully distrains certain goods without the authority of the principal, and pays over the proceeds to the principal. The principal is not deemed to have ratified

Judicial Committee of the Privy Council having, in *Fleming v. Bank of New Zealand*, (1900) A. C. 577, at p. 587; 69 L. J. P. C. 120, reserved liberty to reconsider them.

(*i*) Illustrations 1 and 2. *Edwards v. L. & N. W. Rail. Co.*, 1870, L. R. 5 C. P. 445; 39 L. J. C. P. 241; *Banque Jacques Cartier v. Banque D'Epargne*, 1887, 13 App. Cas. 111; 57 L. J. P. C. 42, P. C.; *The Bonita, The Charlotte*, 1861, 30 L. J. Ad. 145; Lush. 252; *Gunn v. Roberts*, 1874, L. R. 9 C. P. 331; 43 L. J. C. P. 233; *Wall v. Cockerell*, 1863, 10 H. L. Cas. 229; 32 L. J. Ch. 276, H. L.; *De Bussche v. Alt*, 1878, 8 Ch. D. 286; 47 L. J. Ch. 381, C. A.

(*k*) Illustrations 3 and 4. *Hunter v. Parker*, 1840, 7 M. & W. 322; 56 R. R. 723; *Marsh v. Joseph*, (1897) 1 Ch. 214; 66 L. J. Ch. 128, C. A.

(*l*) *Powell v. Smith*, 1872, L. R. 14 Eq. 85; 41 L. J. Ch. 734.

(*m*) Illustration 5.

the wrongful distress by receiving the proceeds, unless he received them with a full knowledge of the irregularity, or intended without inquiry to take the risk upon himself (*n*). So, a principal will not be deemed to ratify a voidable transaction unless he knows that it is voidable (*o*).

2. An agent, with authority to distrain for rent, wrongfully seized and sold a fixture, and paid the proceeds to the principal, who received them without notice of the illegality. Held, that the principal had not ratified the trespass (*p*).

3. An agent, without authority, signed a distress warrant, and, after the distress, informed his principal, who said that he should leave the matter in the agent's hands. Held, that that was a ratification of the whole transaction, though there had been irregularities in levying the distress of which the principal had no knowledge (*q*).

4. An agent entered into an agreement on behalf of his principal. A letter from the principal, saying that he did not know what the agent had agreed to, but that he must support him in all he had done, was held to be a sufficient ratification of the agreement, whatever it might be (*r*).

5. An agent purchased a chattel on his principal's behalf from a person who had no right to sell it, and the principal ratified the purchase. Held, that the principal was guilty of a conversion of the chattel, though he had no knowledge at the time of the ratification that the sale was unlawful. Here, the circumstances rendering the transaction a conversion

(*n*) *Lewis v. Read*, 1845, 14 L. J. Ex. 295; 13 M. & W. 834; 67 R. R. 828.

(*o*) See *Spackman v. Evans*, 1868, L. R. 3 H. L. 171; *Savery v. King*, 1856, 5 H. L. Cas. 627; 25 L. J. Ch. 482; 101 R. R. 299.

(*p*) *Freeman v. Roshier*, 1849, 13 Q. B. 780; 18 L. J. Q. B. 340; 78 R. R. 514. Comp. *Becker v. Riebold*, 1913, 30 T. L. R. 142.

(*q*) *Haselar v. Lemoyne*, 1858, 28 L. J. C. P. 103; 5 C. B. N. S. 530; 116 R. R. 753.

(*r*) *Fitzmaurice v. Bayley*, 1856, 26 L. J. Q. B. 114; 6 El. & Bl. 868; 106 R. R. 827.

were collateral to and did not form part of the contract ratified (s).

### Article 29.

#### HOW AN ACT MAY BE RATIFIED.

The ratification of an act or transaction may be express or implied. A ratification will be implied whenever the conduct of the person, in whose name or on whose behalf the act or transaction is done or entered into, is such as to show that he intends to adopt or recognize such act or transaction in whole or in part (t); and in the case of an agent exceeding his authority, may be implied from the mere silence or acquiescence of the principal (u). The adoption of part of a transaction operates as a ratification of the whole (x).

It is not necessary that the ratification of a written contract should be in writing, even if the contract is one which is unenforceable unless evi-

(s) *Hilberry v. Hatton*, 1864, 2 H. & C. 822; 33 L. J. Ex. 190.

(t) Illustrations 1 to 11. *Benham v. Batty*, 1865, 12 L. T. 266; *Hawley v. Sentance*, 1863, 7 L. T. 745; *Bigg v. Strong*, 1858, 4 Jur. N. S. 983; *Clarke v. Perrier*, 1679, 2 Freem. 48; *Keay v. Fenwick*, 1876, 1 C. P. D. 745, C. A.; *Smith v. Cologan*, 1788, 2 T. R. 189.

(u) Illustrations 5 and 10. *Prince v. Clark*, 1823, 1 B. & C. 186; 25 R. R. 352; *Pott v. Bevan*, 1844, 1 C. & K. 335; *The Australia*, 1859, 13 Moo. P. C. C. 132, P. C.; *Robinson v. Gleadow*, 1835, 2 Bing. N. C. 156; 42 R. R. 568.

(x) Illustrations 2 to 4. *Hovil v. Pack*, 1806, 7 East, 164; *Ferguson v. Carrington*, 1829, 9 B. & C. 59; *Keay v. Fenwick*, 1876, 1 C. P. D. 745, C. A.; *Bristow v. Whitmore*, 1861, 9 H. L. Cas. 391; 31 L. J. Ch. 467, H. L.; *Frizione v. Tagliaferro*, 1856, 10 Moo. P. C. C. 175, P. C.; *Redmell v. Eden*, 1859, 1 F. & F. 542.

denced by writing (*y*), but the execution of a deed can only be ratified by matter of record or by deed (*z*).

*Ratification by companies.*—An act or transaction done or entered into on behalf of a company may be ratified by the directors, if they have power to do or enter into such an act or transaction on behalf of the company (*a*); and a ratification by the directors may be implied from part performance (*a*). Where the act or transaction is beyond the powers of the directors, it can only be effectively ratified by the shareholders (*b*). An act done by the directors in excess of their powers, but within the scope of the memorandum of association, may be ratified by ordinary resolution of the shareholders (*c*), and a ratification by the shareholders is implied if they acquiesce in such an act with a knowledge of the circumstances (*d*).

(*y*) *Maclean v. Dunn*, 1828, 1 M. & P. 761; 29 R. R. 714; *Soames v. Spencer*, 1822, 1 D. & R. 32; 24 R. R. 631.

(*z*) See *Oxford v. Crow*, (1893) 3 Ch. 535; *Hunter v. Parker*, 1840, 7 M. & W. 322; 56 R. R. 723; *Tupper v. Foulkes*, 1861, 30 L. J. C. P. 214; 9 C. B. N. S. 797.

(*a*) *Wilson v. West Hartlepool, &c. Rail. Co.*, 1864, 2 De G. J. & S. 475; *Reuter v. Electric Telegraph Co.*, 1856, 26 L. J. Q. B. 46; 6 El. Bl. 341; 106 R. R. 625; *Hooper v. Kerr*, 1901, 23 L. T. 729. Illustration 10.

(*b*) *Spackman v. Evans*, 1868, L. R. 3 H. L. 171, H. L.

(*c*) *Grant v. U. K. Switchback Rail. Co.*, 1888, 40 Ch. Div. 135, C. A. But see *Boschoek, &c. Co. v. Fuke*, (1906) 1 Ch. 148; 75 L. J. Ch. 261.

(*d*) *London Financial Association v. Kell*, 1883, 26 Ch. Div. 107; *Evans v. Smallcombe*, 1868, L. R. 3 H. L. 249; 37 L. J. Ch. 793, H. L.; *Re Magdalena Steam Navigation Co.*, 1860, 29 L. J. Ch. 667;

*Illustrations.*

1. A shipmaster unnecessarily, and without authority, sells his ship. The owners receive the purchase-money with a full knowledge of the circumstances under which the ship was sold. The receipt of the purchase-money is a ratification of the sale (*e*).

2. A. is a bankrupt. B., at the request of A.'s wife, purchases certain bonds with A.'s money, and hands them to her. The trustee in bankruptcy seizes some of the bonds as part of A.'s estate. The trustee in bankruptcy has ratified the act of B., and thereby discharged him from liability (*f*).

3. A. is a bankrupt. B. wrongfully sells part of A.'s property. The trustee in bankruptcy accepts the proceeds or part thereof, or otherwise recognizes B. as his agent in the transaction. B. is deemed to have been duly authorized by the trustee to sell the property (*g*).

4. An agent purchases goods on behalf of his principal at a price exceeding his limit. The principal objects to the contract, but disposes of some of the goods as his own. He is deemed to have ratified the contract, and is bound by it (*h*).

5. A wife purchases goods, which are not necessaries, in the name of her husband. The husband has control over the goods, and does not return them to the seller. He is deemed to ratify the contract, and must pay for the goods (*i*).

6. A. employs a broker to execute a distress warrant. The

*MacLae v. Sutherland*, 1854, 23 L. J. Q. B. 229; 3 E. & B. 1; 97 R. R. 332; *Phosphate of Lime Co. v. Green*, 1871, L. R. 7 C. P. 43.

(*e*) *The Bonita, The Charlotte*, 1861, Lush. 252; *Hunter v. Parker*, 1840, 7 M. & W. 322; 56 R. R. 723.

(*f*) *Wilson v. Poulter*, 1724, 2 Str. 859.

(*g*) *Brewer v. Sparrow*, 1827, 7 B. & C. 310; *Lythgoe v. Vernon*, 1860, 29 L. J. Ex. 164. *Comp. Valpy v. Sanders*, 1848, 17 L. J. C. P. 249; 5 C. B. 887; 75 R. R. 844.

(*h*) *Cornwall v. Wilson*, 1750, 1 Ves. 510.

(*i*) *Waithman v. Wakefield*, 1807, 1 Camp. 120; 10 R. R. 654.

broker, in executing the warrant, illegally seizes goods belonging to B. In answer to a letter from B. demanding compensation, A. writes that his solicitor will accept service of any process B. thinks proper to issue. This reply is evidence of a ratification by A. of the wrongful seizure (*k*).

7. A party to a contract which is fraudulent and voidable as against him sues on the contract. He is deemed to ratify the entire contract (*l*). But a principal is not deemed to ratify a contract merely because, after repudiating it, he enters into negotiations for a compromise with the other contracting party (*m*).

8. A debtor whose debt has been paid without his authority pleads the payment in an action by the creditor for the debt. The plea is a sufficient ratification by the debtor of the payment (*n*).

9. A. receives the rents of certain property for many years without the authority of the owner. The owner sues A. for possession, and for an account of the rents and profits. The action is a sufficient ratification to render A. the agent of the owner from the commencement (*o*).

10. The chairman and deputy-chairman of directors, and the secretary, of a manufacturing company, respectively ordered goods which were necessary for the purposes of the business of the company, and the goods were supplied and used therein. Held, that though the goods were ordered without authority, the directors must be taken to have known that they had been supplied, and used in the business, and that therefore the company was liable for the price (*p*).

(*k*) *Carter v. St. Mary Abbott's Vestry*, 1900, 64 J. P. 548, C. A.

(*l*) *Ferguson v. Carrington*, 1829, 9 B. & C. 59.

(*m*) *Barrett v. Irvine*, (1907) 2 Ir. R. 462, C. A.

(*n*) *Belshaw v. Bush*, 1852, 22 L. J. C. P. 24; 11 C. B. 191; 87 R. R. 639. See also *Simpson v. Eggington*, 1855, 10 Ex. 845; 102 R. R. 867.

(*o*) *Lyell v. Kennedy*, 1889, 14 App. Cas. 437, H. L.

(*p*) *Smith v. Hull Glass Co.*, 1852, 21 L. J. C. P. 106; 11 C. B. 897; 87 R. R. 804; *Allard v. Bourne*, 1863, 15 C. B. N. S. 468.

11. A. contracts to do certain specified repairs to a ship. An agent of the shipowner, whose authority is to the knowledge of A. limited to the repairs so specified, sanctions certain variations in the work, and the repairs are executed according to the contract as varied. The shipowner sells the ship as repaired. The sale is not a ratification of the unauthorized variations (*q*).

### Article 30.

#### EFFECT OF RATIFICATION.

The effect of ratification is to invest the person on whose behalf the act ratified was done, the person who did the act, and third persons, with the same rights, duties, and liabilities in all respects as if the act had been done with the previous authority of the person on whose behalf it was done (*r*). Provided, that no ratification can operate to divest or prejudicially affect any proprietary right vested in any third person at the time of the ratification (*s*). Provided also, that the ratification of a contract does not give the person who ratifies it a right of action in respect of any breach thereof committed before the time of the ratification (*t*).

(*q*) *Forman v. The Liddesdale*, (1900) A. C. 190; 69 L. J. P. C. 44, P. C.

(*r*) See the judgments in *Wilson v. Tunman*, 1843, 6 M. & G. 236; 64 R. R. 770; and *Bird v. Brown*, 1850, 4 Ex. 786; 80 R. R. 775; Illustrations 1 to 14; *Jennings v. Moore*, 1708, 2 Vern. 609.

(*s*) Illustration 15; and see Article 27, Illustration 3.

(*t*) *Kidderminster v. Hardwicke*, 1873, L. R. 9 Ex. 13; 43 L. J. Ex. 9.

Ratification does not, of itself, give any new authority to the person whose act is ratified (*u*).

*Illustrations.*

1. A British naval commander destroyed certain property and released certain slaves belonging to a Spanish subject. The foreign and colonial Secretaries of State ratified the act of the commander. Held, that the ratification rendered the act an act of state, for which no action would lie at the suit of the Spanish subject (*x*).

2. A. purchases a chattel on behalf of B., under such circumstances that the dealing with the property in the chattel is a conversion. B. ratifies the purchase. A. and B. are jointly and severally liable for the conversion (*y*).

3. A., an agent of a corporation, assaults B., for the supposed benefit of the corporation. The corporation ratifies the assault. It is liable to B. in an action for damages (*z*).

4. A., on B.'s behalf, but without his authority, distrains goods belonging to C. B. ratifies the distress. If B. had a right to distrain, A. is discharged from liability, the ratification having a retroactive effect, and rendering the distress lawful *ab initio* (*a*). If B. had no right to distrain, A. and B. are jointly and severally liable as trespassers (*b*).

5. A. makes a contract on behalf of B. without his

(*u*) *Irvine v. Union Bank of Australia*, 1877, 2 App. Cas. 366; 46 L. J. P. C. 87, P. C. A ratification may be conditional: *Holt v. Brien*, 1821, 4 B. & Ald. 252.

(*x*) *Buron v. Denman*, 1848, 2 Ex. 167; 76 R. R. 554. See also *Secretary of State for India v. Kamachee Boye Sahaba*, 1859, 13 Moo. P. C. 22, P. C.

(*y*) *Hilberry v. Hatton*, 1864, 2 H. & C. 822; 33 L. J. Ex. 190; and see *Irving v. Motly*, 1831, 7 Bing. 543.

(*z*) *Eastern Counties Rail. Co. v. Broom*, 1851, 6 Ex. 314; 20 L. J. Ex. 196; 86 R. R. 310, Ex. Ch.

(*a*) *Whitehead v. Taylor*, 1839, 10 A. & E. 210; 50 R. R. 385; *Hull v. Pickersgill*, 1819, 1 Brod. & B. 282; 21 R. R. 598.

(*b*) See *Bird v. Brown*, 1850, 4 Ex. 786; 80 R. R. 775.



authority. B. ratifies the contract. B. is liable on the contract, and A. is discharged from liability unless he contracted personally (c).

6. An agent does an act in excess of his authority. The principal ratifies the act. The agent is not liable to the principal for having exceeded his authority (d).

7. A. converts the property of a bankrupt by selling or disposing of it without the authority of the trustee in bankruptcy. The trustee ratifies the sale or disposition by receiving the proceeds or otherwise. A. is discharged from liability in respect of the conversion (e).

8. A factor contracts to purchase goods on his principal's behalf at a price exceeding his limit. The principal ratifies the contract. He must pay the factor the full price (f).

9. The relatives of a deceased person order an extravagant funeral. If the executor or administrator ratifies the order, he is personally liable for the whole expense (g).

10. The secretary of a company, without the authority of the directors, sends out a notice purporting to have been issued by order of the board, convening an extraordinary general meeting, a requisition for such meeting having been duly served on the company in accordance with the articles of association. At a board meeting held two days before the date for which the general meeting is called, the directors resolve to ratify and confirm the issuing of the notice by the

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(c) *Spittle v. Lavender*, 1821, 5 Moore, 270; 23 R. R. 508.

(d) *Clarke v. Perrier*, 1679, 2 Freem. 48; *Smith v. Cologan*, 1788, 2 T. R. 189; *Cornwall v. Wilson*, 1750, 1 Ves. 510; *Risbourg v. Bruckner*, 1858, 27 L. J. C. P. 90; 3 C. B. N. S. 812; 111 R. R. 846.

(e) *Brewer v. Sparrow*, 1827, 7 B. & C. 310; *Wilson v. Poulter*, 1724, 2 Str. 859; *Smith v. Baker*, 1873, L. R. 8 C. P. 350; 42 L. J. C. P. 155; *Lythgoe v. Vernon*, 1860, 29 L. J. Ex. 164.

(f) *Cornwall v. Wilson*, 1750, 1 Ves. 510.

(g) *Brice v. Wilson*, 1838, 8 A. & E. 349; *Lucy v. Walrond*, 1837, 3 Bing. N. C. 841; 43 R. R. 815.

secretary. The notice is thereby rendered valid, and the meeting is duly summoned (*h*).

11. A. insures goods, in which he has no insurable interest, on behalf of B. B., who has an insurable interest in the goods, ratifies the insurance. The insurable interest of B. is sufficient to support an action by A. on the policy (*i*).

12. The managing owner of a ship sells her through his agent. His co-owners ratify the sale. The owners are jointly liable to the agent for his commission (*k*). So, if a principal ratifies the act of a sub-agent, he is liable to the sub-agent for his commission (*l*).

13. A shipmaster entered into contracts with the Admiralty for the transport of troops, and paid and incurred various sums and liabilities to enable him to perform the contracts, the shipowner being bankrupt, and having mortgaged the vessel. Held, that the master had a right to be repaid the expenses and indemnified against the liabilities, out of the freight due from the Admiralty, the assignees in bankruptcy and mortgagees not being entitled to take the benefit of the contract, unless they also adopted the burdens connected therewith (*m*).

14. An agent defends an action brought against him for breach of a contract entered into by him on behalf of his principal. The principal ratifies what he has done. The principal must indemnify the agent against the damages and costs recovered by the plaintiff in the action (*n*). So, where a person is made a party to an action without his authority,

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(*h*) *Hooper v. Kerr*, 1901, 83 L. T. 729.

(*i*) *Wolff v. Horncastle*, 1798, 1 B. & P. 316; 4 R. R. 808.

(*k*) *Keay v. Fenwick*, 1876, 1 C. P. D. 745, C. A.

(*l*) *Mason v. Clifton*, 1863, 3 F. & F. 899.

(*m*) *Bristow v. Whitmore*, 1861, 9 H. L. Cas. 391; 31 L. J. Ch. 467.

(*n*) *Frisione v. Tugliaferro*, 1856, 10 Moo. P. C. C. 175, P. C.; and see *Gleadow v. Hull Glass Co.*, 1849, 19 L. J. Ch. 44.

he cannot avail himself of the benefit of the action, unless he pays the costs of conducting it (o).

15. A commodore in the navy, without authority to do so, appointed a captain. Held, that even if the Crown ratified the appointment, that would not give the commodore the right to share as a commodore with a captain under him, in prizes taken before the date of the ratification, because the rights to the various shares in those prizes would then be already vested (p).

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(o) *Hall v. Laver*, 1842, 1 Hare, 571; 58 R. R. 198.

(p) *Donnelly v. Popham*, 1807, 1 Taunt. 1; 9 R. R. 687.

## CHAPTER VI.

## AUTHORITY OF AGENTS.

THE authority of an agent may be express or implied. Its nature and extent may be defined by a power of attorney, a formal instrument under seal, by writing not under seal, or by verbal instructions, or may be inferred from a course of dealing between the parties (*a*). Authority may be implied from the situation of the parties, the circumstances of the particular case, the usage of trade or business, or the conduct of the principal.

## Article 31.

## AUTHORITY CANNOT EXCEED POWERS OF PRINCIPAL.

The authority, whether express or implied, of every agent is confined within the limits of the powers of his principal (*b*).

Thus, an agent of a corporation or incorporated company cannot have any authority, express or implied, to do any act on behalf of the corporation or company which is *ultra vires* (*b*).

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(*a*) *Pole v. Leask*, 1860, 28 Beav. 562; 29 L. J. Ch. 888.

(*b*) *Shrewsbury, &c. Rail. Co. v. L. & N. W. Rail. Co.*, 1857, 6 H. L. Cas. 113; 108 R. R. 46, H. L.; *Montreal Assurance Co. v. M'Gillivray*, 1859, 13 Moo. P. C. C. 87, P. C.; *Poulton v. S. W. Rail.*, 1867, L. R. 2 Q. B. 534; 36 L. J. Q. B. 294; *Ashbury Carriage Co. v. Riche*, 1875, L. R. 7 H. L. 653; 44 L. J. Ex. 185, H. L.

## Article 32.

## CONSTRUCTION OF AUTHORITY GIVEN IN GENERAL TERMS.

Authority conferred in general terms is construed as authority to act only in the usual way, and according to the ordinary course of business.

In particular, an agent who is authorized to receive payment of money has, *prima facie*, no authority to receive payment otherwise than in cash, unless it is usual or customary in the particular business to receive payment in some other form, and the usage or custom in question either is a reasonable one, or is known to the principal at the time when he confers the authority (*c*).

*Illustrations.*

1. A stockbroker is authorized to sell stock or shares. He has no authority to sell on credit, because it is not usual to sell stock or shares on credit (*d*).

2. A. is authorized to sell and warrant certain goods. He cannot bind his principal by a warranty given at any other time than at the sale of the goods (*e*).

3. On the dissolution of a partnership, authority is given to one of the partners by his co-partners—(1) to settle the partnership affairs (*f*); or (2) to receive all debts owing to,

(*c*) Illustrations 4 to 8; and see Article 39, and Article 99, Illustrations 14 to 17.

(*d*) *Wiltshire v. Sims*, 1808, 1 Camp. 258; 10 B. R. 673.

(*e*) *Helyear v. Hawke*, 1803, 5 Esp. 72.

(*f*) *Abel v. Sutton*, 1800, 3 Esp. 108; 6 B. R. 818. See, also, *Odell v. Cormack*, 1887, 19 Q. B. D. 223. Comp. *Smith v. Winter*, 1838, 4 M. & W. 454; 8 L. J. Ex. 34; 51 B. R. 678.

and to pay all debts owing by, the firm (*g*). In neither case has he authority to draw, accept, or indorse bills of exchange in the name of the firm.

*Authority to receive payment of money.*

4. A. is authorized to receive payment of money. He has no authority—(1) to receive payment before the money is due, and if his authority be revoked before that time, the debtor is not discharged by such a payment (*h*); (2) to receive payment by cheque (*i*), unless he can prove that in the particular business in which he is employed, it is usual to receive payment by cheque (*k*); the burden of proving any such custom lies on the person who seeks to establish the authority (*i*); or (3) to receive payment by way of set-off or settlement of accounts between himself and the debtor (*l*).

5. It is provided by the conditions at a sale by auction that the purchase-money for the goods sold shall be paid to the auctioneer. The auctioneer has no authority to receive a bill of exchange in payment, and if his authority to receive payment is revoked during the currency of the bill, such a payment does not discharge the purchaser (*m*). So, an insurance broker has no authority to take a bill of exchange

(*g*) *Kilgour v. Finlyson*, 1789, 1 H. Bl. 156.

(*h*) *Breming v. Mackie*, 1862, 3 F. & F. 197.

(*i*) *Papè v. Westacott*, (1894) 1 Q. B. 272; 63 L. J. Q. B. 222, C. A.; *Blumberg v. Life Interests, &c. Corporation*, (1897) 1 Ch. 171; (1898) 1 Ch. 27; 66 L. J. Ch. 127, C. A.

(*k*) *Bridges v. Garrett*, 1870, L. R. 5 C. P. 451; 39 L. J. C. P. 251, Ex. Ch.; *Walker v. Barker*, 1900, 16 T. L. R. 393.

(*l*) *Underwood v. Nicholls*, 1855, 25 L. J. C. P. 79; 17 C. B. 239; 104 R. R. 675; *Sweeting v. Pearce*, 1859, 29 L. J. C. P. 266; 7 C. B. N. S. 449; *Coupe v. Collyer*, 1890, 62 L. T. 927; *Wrout v. Daves*, 1858, 27 L. J. Ch. 635; 25 Beav. 369; 119 R. R. 454; *Legge v. Byas*, 1902, 7 Com. Cas. 16. See, also, Illustration 8, and cases there cited.

(*m*) *Williams v. Evans*, 1866, L. R. 1 Q. B. 352; 35 L. J. Q. B. 111; *Sykes v. Giles*, 1839, 5 M. & W. 645; 9 L. J. Ex. 106; 52 R. R. 870.

in payment of a claim, of which he is authorized to receive payment (*n*).

6. An agent is authorized to receive payment of an account, and to retain part of the amount in discharge of a debt due to him from the principal. He has authority, to the extent of his debt, to settle in his own way with the debtor of his principal (*o*).

7. A. authorizes B., a stockbroker, to receive money due from C., also a stockbroker. B. has no authority to settle with C. by way of set-off, and such a settlement does not bind A. (*p*).

8. A. authorizes B., an insurance broker, to receive the amount due under a policy of insurance from the underwriters. The underwriters in good faith settle with B. by setting off a debt due to them from him, and their names are struck out of the policy. By a custom at Lloyd's, a set-off is considered equivalent to payment as between broker and underwriter. If A. was aware of the custom when he authorized B. to receive payment, he is bound by the settlement. If he was not aware of the custom, he is not bound by the settlement (*q*). Such a custom is unreasonable, and the principal is, therefore, not deemed to have authorized the broker to follow it unless he had notice of it (*q*).

(*n*) *Hine v. S. S. Ins. Syndicate*, 1895, 72 L. T. 79, C. A.

(*o*) *Barker v. Greenwood*, 1836, 6 L. J. (N. S.) Ex. Eq. 54; 2 Y. & C. 414; 47 R. R. 431.

(*p*) *Pearson v. Scott*, 1878, 9 Ch. Div. 198; 47 L. J. Ch. 705; *Blackburn v. Mason*, 1893, 68 L. T. 510, C. A.; *Anderson v. Sutherland*, 1897, 13 T. L. R. 163.

(*q*) *Sweeting v. Pearce*, 1859, 7 C. B. N. S. 449; 29 L. J. C. P. 266; *Todd v. Reid*, 1821, 4 B. & Ald. 210; *Bartlett v. Pentland*, 1830, 10 B. & C. 760; 34 R. R. 560; *Stewart v. Aberdeen*, 1838, 4 M. & W. 211; 51 R. R. 536; *Scott v. Irving*, 1830, 1 B. & Ad. 605; 35 R. R. 396; *Matvieff v. Crossfield*, 1903, 51 W. R. 365.

## Article 33.

## AUTHORITY GIVEN IN AMBIGUOUS TERMS.

Where the authority of an agent is conferred in such ambiguous terms, or the instructions given to him are so uncertain, as to be fairly capable of more than one construction, every act done by him in good faith, which is warranted by any one of those constructions, is deemed to have been duly authorized, though the construction adopted and acted upon by him was not the one intended by the principal (*r*).

*Illustrations.*

1. An agent was instructed to sell goods at such a price as would realize 15s. per ton, net cash. He sold them at 15s. 6d. per ton, subject to two months' credit. Held, that the instructions might fairly be construed as meaning either 15s. net cash, such a price as would eventually realize 15s. after allowing for interest, or a *del credere* commission; and that the sale at 15s. 6d., two months, was within the authority (*s*).

2. A commission agent was authorized to buy and ship 500 tons of sugar (subject to a certain limit in price, to cover cost, freight, and insurance), 50 tons more or less of no moment, if it enabled him to secure a suitable vessel. Held,

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(*r*) *Ireland v. Livingston*, 1872, L. R. 5 H. L. 395; 41 L. J. Q. B. 201, H. L.; *Loring v. Davis*, 1886, 32 Ch. Div. 625; 55 L. J. Ch. 725; *Johnston v. Kershaw*, 1867, L. R. 2 Ex. 82; 36 L. J. Ex. 44; *Weigall v. Runciman*, 1916, 85 L. J. K. B. 1187, C. A.; and see Illustrations.

(*s*) *Boden v. French*, 1851, 10 C. B. 886; 84 R. R. 836.



by the House of Lords, reversing the Exchequer Chamber, that a shipment of 400 tons was a good execution of the authority (*t*).

3. An agent undertook to sell and transfer certain stock when the funds should be at 85 or over. Held, that he was bound to sell when the funds reached 85, and had no discretion to wait until they went higher than that price (*u*).

### Article 34.

#### CONSTRUCTION OF POWERS OF ATTORNEY.

Powers of attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implication (*x*). The following are the most important rules of construction—

- (1.) The operative part of the deed is controlled by the recitals (*y*).
- (2.) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts (*z*).

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(*t*) *Ireland v. Livingston*, 1872, L. R. 5 H. L. 395; 41 L. J. Q. B. 201, H. L.

(*u*) *Bertram v. Godfray*, 1830, 1 Knapp, 381, P. C.

(*x*) *Bryant v. La Banque du Peuple*, (1893) A. C. 170; 62 L. J. P. C. 68, P. C.; *Jonmenjoy Coondoo v. Watson*, 1884, 9 App. Cas. 561; 53 L. J. P. C. 80, P. C.; *Jenkins v. Gould*, 1827, 3 Russ. 385; and see Illustrations.

(*y*) Illustration 1.

(*z*) Illustrations 2 and 3; *Perry v. Holl*, 1860, 29 L. J. Ch. 677; 2 De G. F. & J. 38.

(3.) General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers when necessary, and only when necessary, for that purpose (a).

(4.) The deed must be construed so as to include all medium powers necessary for its effective execution (b).

#### *Illustrations.*

1. A power of attorney recited that the principal was going abroad, and the operative part gave authority in general terms. Held, that the authority subsisted only during the principal's absence abroad (c).

2. Power was given "to demand and receive all moneys due to the principal on any account whatsoever, and to use all means for the recovery thereof, to appoint attorneys to bring actions, and to revoke such appointments, and to do all other business." Held, that "all other business" must be construed to mean all other business necessary for the recovery of the moneys, or in connection therewith; and that the power of attorney gave the agent no authority to indorse a bill of exchange received by him thereunder (d). So,

(a) *Lewis v. Ramsdale*, 1836, 55 L. T. 179; *Attwood v. Munnings*, 1827, 7 B. & C. 278; 31 R. R. 194; *Re Bowles*, 1874, 31 L. T. 365; *Harper v. Godsell*, 1870, L. R. 5 Q. B. 422; 39 L. J. Q. B. 185; *Bryant v. La Banque du Peuple*, (1893) A. C. 170; 62 L. J. P. C. 68, P. C.

(b) Illustrations 8 and 9; *Withington v. Herring*, 1829, 5 Bing. 442; *Howard v. Baillie*, 1796, 2 H. Bl. 618; 3 R. R. 531; *Willis v. Palmer*, 1860, 29 L. J. C. P. 194; 7 C. B. N. S. 340; *Routh v. Macmillan*, 1863, 33 L. J. Ex. 38; 2 H. & C. 750.

(c) *Danby v. Coutts*, 1885, 29 Ch. Div. 500; 54 L. J. Ch. 577.

(d) *Hogg v. Snaithe*, 1808, 1 Taunt. 347; 9 R. R. 788; *Hay v. Gold*

power "to demand, sue for, recover and receive, by all lawful ways and means, all moneys, debts, and dues whatsoever, and to give sufficient discharges, and to transact all business," was held to give no authority to indorse bills of exchange on behalf of the principal (e).

3. A., who carried on business in Australia, gave an agent in England a power of attorney to purchase goods in connection with the business, either for cash or on credit, and where necessary in connection with any such purchases, or in connection with the business, to make, draw, sign, accept or indorse for him and on his behalf any bills of exchange or promissory notes which should be requisite or proper. It was held that the power of attorney gave no power to borrow money, and the agent, purporting to act in pursuance of the power, having given bills of exchange in respect of a loan, and misapplied the money, that A. was not liable on the bills (f).

4. A power of attorney "to recover and receive all sums of money owing . . . by virtue of any security . . . and to give, sign, and execute receipts, releases, or other discharges for the same, . . . and to sell any real or personal property . . . belonging" to the principal, does not authorize the agent to exercise the statutory power of sale of real property vested in the principal as a mortgagee (g).

5. A resident director and manager of a mining company was authorized by deed "to direct the mine so as most effectually to promote the interests of the company, to employ workmen, provide needful implements, &c., but not to engage the credit of the company for more than 50*l.* without the express authority in writing of the managing directors."

*Smith*, 1804, 1 Taunt. 349; 9 R. R. 790; *Esdaile v. La Nauze*, 1840, 4 L. J. Ex. Eq. 46; 1 Y. & C. 394; 41 R. R. 299.

(e) *Murray v. East India Co.*, 1821, 5 B. & A. 204; 24 R. R. 325.

(f) *Jacobs v. Morris*, (1902) 1 Ch. 816; 71 L. J. Ch. 363, C. A.

(g) *Re Dawson and Jenkins' Contract*, (1904) 2 Ch. 219; 73 L. J. Ch. 684, C. A.

Held, that he had no authority to bind the company by accepting bills of exchange (*h*).

6. An executor gave a power of attorney to transact in his name all the affairs of the testator. Held, that the agent had no authority to accept a bill of exchange in the name of the executor so as to bind him personally (*i*).

7. A power of attorney "from time to time to negotiate, make sale, dispose of, assign and transfer," gives no authority to "pledge" (*k*). But a power "to sell, indorse and assign," does authorize an indorsement to a bank as security for a loan to the agent; such a power is construed as giving (1) authority to sell, (2) authority to indorse, and (3) authority to assign (*l*).

8. A partner gave his son a power of attorney "to act on his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit." Held, that this gave the son power to submit the partnership accounts to arbitration (*m*).

9. A power of attorney "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings touching anything in which the principal or his ships or other personal estate may be in anywise concerned," authorizes the attorney to sign on behalf of the principal a bankruptcy petition against a debtor of the principal (*n*).

(*h*) *Brown v. Byers*, 1847, 16 L. J. Ex. 112; 16 M. & W. 252. And see *Smith v. Prosser*, (1907) 2 K. B. 735; 77 L. J. K. B. 71, C. A.

(*i*) *Gardner v. Baillie*, 1796, 6 T. R. 591; 3 R. B. 531, 538. (*Howard v. Baillie*, 2 H. Bl. 618; 3 R. B. 531, was decided on the ground of ratification.)

(*k*) *Jonmenjoy Coondoo v. Watson*, 1884, 9 App. Cas. 561; 53 L. J. P. C. 80, P. C.; *De Bouchout v. Goldsmid*, 1800, 5 Ves. 211.

(*l*) *Bank of Bengal v. Macleod*, 1849, 5 Moo. Ind. App. 1; 83 R. R. 1; *Bank of Bengal v. Fagan*, 1849, 5 Moo. Ind. App. 27; 83 R. R. 15, P. C.

(*m*) *Henley v. Soper*, 1828, 8 B. & C. 16.

(*n*) *Re Wallace, Ex p. Richards*, 1884, 14 Q. B. D. 22; 54 L. J. Q. B. 293, C. A.

## Article 35.

## CONSTRUCTION OF AUTHORITY NOT GIVEN UNDER SEAL.

Where the authority of an agent is given by an instrument not under seal, or is given verbally, it is construed liberally, having due regard to the object of the authority and to the usages of trade or business (*o*).

## IMPLIED AUTHORITY.

## Article 36.

TO DO WHAT IS NECESSARY FOR OR INCIDENTAL TO  
EFFECTIVE EXECUTION OF EXPRESS AUTHORITY.

Every agent has implied authority to do whatever is necessary for or ordinarily incidental to the effective execution of his express authority in the usual way (*p*).

*Illustrations.*

1. A. is authorized to enter into a binding contract. He has implied authority to sign a memorandum thereof to

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(*o*) *Pole v. Leask*, 1860, 28 Beav. 562; 29 L. J. Ch. 888; *Entwisle v. Dent*, 1848, 1 Ex. 812; 18 L. J. Ex. 138; *Pariente v. Lubbock*, 1855, 20 Beav. 588; 114 R. R. 1; *Gillow v. Aberdare*, 1893, 9 T. L. R. 12, C. A.; *Ex p. Howell*, 1865, 12 L. T. 785; *Ex p. Frampton*, 1859, 1 De G. F. & J. 263; *Tallentire v. Ayre*, 1884, 1 T. L. R. 143, C. A.

(*p*) *Beaufort v. Neeld*, 1845, 12 C. & F. 248, H. L.; *Pole v. Leask*, *supra*; *Dingle v. Hare*, 1859, 7 C. B. N. S. 145; 29 L. J. C. P. 143; *Capel v. Thornton*, 1828, 3 C. & P. 352; 33 R. R. 678; and see *Illustrations*.

satisfy the Statute of Frauds, or the Sale of Goods Act, 1893 (*q*).

2. A. is authorized to buy certain railway shares. He has implied authority to do everything in the usual course of business necessary to complete the bargain (*r*).

3. A. is employed to get a bill of exchange discounted. He has implied authority to warrant it a good bill, but not to indorse it in the name of the principal (*s*).

4. A. is authorized to receive and sell certain goods, and to pay himself a debt out of the proceeds. He has implied authority to bring an action against a third person wrongfully withholding possession of the goods (*t*).

5. An agent is employed to find a purchaser for certain property. He has implied authority to describe the property, and state to an intending purchaser any facts or circumstances which may affect its value (*u*).

6. A horse-dealer or other person who is accustomed to buying and selling horses, authorizes A. to sell a horse privately. A. has implied authority to give a warranty on the sale of the horse (*x*).

7. A., a person who is not accustomed to buying and selling horses, authorizes his servant to sell a horse privately. The servant has no implied authority to warrant the horse (*y*).

8. A., a person who is not accustomed to buying and selling horses, authorizes his servant to sell a horse at a fair

(*q*) *Durrell v. Evans*, 1862, 1 H. & C. 174; 31 L. J. Ex. 337; *Wallace v. Roe*, (1903) 1 Ir. R. 32; *Rosenbaum v. Belson*, (1900) 2 Ch. 267; 69 L. J. Ch. 569.

(*r*) *Bayley v. Wilkins*, 1849, 18 L. J. C. P. 273; 7 O. B. 886; 78 R. R. 849.

(*s*) *Fenn v. Harrison*, 1791, 3 T. R. 757; 4 T. R. 177.

(*t*) *Curtis v. Burclay*, 1826, 5 B. & C. 141.

(*u*) *Mullens v. Miller*, 1882, 22 Ch. Div. 194; 52 L. J. Ch. 380.

(*x*) *Howard v. Sheward*, 1866, L. R. 2 C. P. 148; 36 L. J. C. P. 42; *Bank of Scotland v. Watson*, 1813, 1 Dow. 45; 14 R. R. 11, H. L.; *Bultry v. Bates*, 1885, 52 L. T. 620.

(*y*) *Brady v. Todd*, 1861, 9 C. B. N. S. 592; 30 L. J. C. P. 223; overruling *Alexander v. Gibson*, 1811, 2 Camp. 555; 11 R. R. 797.

or public market-place. The servant has implied authority to warrant the horse (*z*).

9. A. is authorized merely to deliver a horse. He has no implied authority to warrant it (*a*).

10. An agent is authorized to receive certain rents for his own benefit. He has no implied authority to distrain for the rents (*b*).

11. An agent is employed to find a purchaser and to contract for the sale of an estate. He has no implied authority, as such, to receive the purchase-money (*c*).

12. An agent is employed to obtain payment of a bill of exchange from the acceptor. He has no implied authority to receive payment subject to a condition that the acceptor shall not be liable for the expenses of protesting the bill for non-payment (*d*).

13. An agent is authorized to receive payment of a mortgage debt. He has no implied authority to exercise the implied power of sale conferred on mortgagees by the Conveyancing Act, 1881 (*e*).

### Article 37.

#### IMPLIED AUTHORITY OF GENERAL AGENTS.

Every agent who is authorized to conduct a particular trade or business (*f*), or generally to act for his principal in matters of a particular nature,

(*z*) *Brooks v. Hassall*, 1883, 49 L. T. 569.

(*a*) *Woodin v. Burford*, 1834, 3 L. J. Ex. 75; 2 C. & M. 391; 39 R. R. 802.

(*b*) *Ward v. Shew*, 1833, 2 L. J. C. P. 58; 9 Bing. 608; 35 R. R. 640.

(*c*) *Mynn v. Joliffe*, 1834, 1 M. & Rob. 326; 42 R. R. 802.

(*d*) *Bank of Scotland v. Dominion Bank*, (1891) A. C. 592, H. L. Sc.

(*e*) *Re Dowson and Jenkins' Contract*, (1904) 2 Ch. 219; 73 L. J. Ch. 684, C. A.

(*f*) Illustrations 1 to 5.

or to do a particular class of acts (*g*), has implied authority to do whatever is incidental to the ordinary conduct of such a trade or business (*h*), or of matters of that nature, or is within the scope of that class of acts (*g*), and whatever is necessary for the proper and effective performance of his duties (*i*); but not to do anything that is outside the ordinary scope of his employment and duties (*k*).

### *Illustrations.*

1. A. is the manager of an estate. He has implied authority to contract for the usual and customary leases (*l*), and to give and receive notices to quit to and from the tenants (*m*); and to enter into agreements with tenants authorizing them to change the mode of cultivation, and providing for the basis on which compensation for improvements shall be payable on the determination of the tenancy (*n*).

2. A. is the managing owner (ship's husband) of a ship. He has implied authority to pledge the credit of his co-owners for all such things, including repairs, as are necessary for the

(*g*) Illustrations 6 to 8; *Ex p. Howell*, 1865, 12 L. T. 785; *Peers v. Sneyd*, 1853, 17 Beav. 151; 99 R. R. 78; *Jones v. Phipps*, 1868, L. R. 3 Q. B. 567; 37 L. J. Q. B. 198; *Webber v. Granville*, 1860, 30 L. J. C. P. 92. For implied authority of shipmasters, see *post*, pp. 101 to 108.

(*h*) Illustrations 1 to 5.

(*i*) Illustrations 8 and 15 to 17; *Langan v. G. W. Rail. Co.*, 1874, 30 L. T. 173; 26 L. T. 577, Ex. Ch.

(*k*) *Linford v. Provincial, &c. Ins. Co.*, 1864, 34 Beav. 291; *Cox v. Mid. Rail. Co.*, 1849, 3 Ex. 268; 77 R. R. 623; Illustrations 2 and 9 to 17.

(*l*) *Peers v. Sneyd*, 1853, 17 Beav. 151.

(*m*) *Papillon v. Brunton*, 1860, 29 L. J. Ex. 265; 5 H. & N. 518; 120 R. R. 704; *Jones v. Phipps*, 1868, L. R. 3 Q. B. 567; 37 L. J. Q. B. 198.

(*n*) *Re Pearson*, (1899) 2 Q. B. 618; 68 L. J. Q. B. 878.



usual or suitable employment of the ship (*o*). But he has no implied authority, as managing owner, to insure the vessel on behalf of his co-owners (*p*), or to agree to pay a sum of money for the cancellation of a charter-party made by him on their behalf (*q*).

3. A. is the manager of a beerhouse. He has implied authority to order cigars for such beerhouse (*r*). So, the manager of a manufacturing company has implied authority to order goods necessary for the company's business (*s*).

4. A. is the manager of a business which he carries on in his own name as apparent principal. Drawing and accepting bills of exchange are incidental to the ordinary conduct of such a business. A. has implied authority to accept a bill in the name in which the business is carried on (*i.e.*, his own name), and the principal is liable on a bill so accepted (*t*).

5. A. is the general manager of a railway company. He has implied authority to order medical attendance for a servant of the company, on the company's credit (*u*).

6. A. is the foreman of a saw-mill. He has implied authority to enter into a written contract for the sale of staves (*x*).

7. A. is a traveller for the sale of goods in the provinces on behalf of a principal in London. A. has implied authority to receive payment in money for the goods sold by him, but not to accept other goods by way of payment (*y*).

(*o*) *The Huntsman*, (1894) P. 214; *Barker v. Highley*, 1863, 32 L. J. C. P. 270; 15 C. B. N. S. 27.

(*p*) *Robinson v. Gleadow*, 1835, 2 Bing. N. C. 156; 42 R. R. 568.

(*q*) *Thomas v. Lewis*, 1878, 4 Ex. D. 18; 48 L. J. Ex. 7.

(*r*) *Watteau v. Fenwick*, (1893) 1 Q. B. 346. See *Kinahan v. Parry*, (1911) 1 K. B. 459; 80 L. J. K. B. 276, C. A.

(*s*) *Smith v. Hull Glass Co.*, 1852, 11 C. B. 897; 21 L. J. C. P. 106; 87 R. R. 804.

(*t*) *Edmunds v. Bushell*, 1865, L. R. 1 Q. B. 97; 35 L. J. Q. B. 20.

(*u*) *Walker v. G. W. Rail. Co.*, 1867, L. R. 2 Ex. 228. Comp. Illustration 13.

(*x*) *Richardson v. Cartwright*, 1844, 1 C. & K. 328.

(*y*) *Howard v. Chapman*, 1831, 4 C. & P. 508; 34 R. R. 814. See

8. A. is the matron of a hospital. She has implied authority to pledge the credit of the managing committee, for meat supplied for the use of the hospital (*z*).

9. A. is the bailiff of a large farming establishment, all payments and receipts in reference thereto passing through his hands. He has no implied authority, as such, to draw or indorse bills of exchange in the name of his principal (*a*).

10. A. is a rent collector. He has no implied authority, as such, to receive notice to quit from a tenant (*b*). So, a steward has no implied authority, as such, to grant leases for terms of years (*c*) nor the cashier of a picture engraver to sell his master's engravings (*d*).

11. A groom or coachman has no implied authority, as such, to pledge the credit of his master for forage for the master's horses (*e*).

12. A. is the general manager of a company. He has no implied authority to contract on the company's behalf to purchase its own shares, even if the articles of association give the directors such a power (*f*).

13. A. is station master. He has no implied authority, as such, to pledge the credit of the railway company for medical attendance to an injured passenger (*g*).

14. *Insurance agents*.—A. is the agent of an insurance

*International Sponge Importers v. Watt*, (1911) A. C. 279; 81 L. J. P. C. 12, H. L.

(*z*) *Real and Personal Advance Co. v. Phalempin*, 1893, 9 T. L. R. 569, C. A.

(*a*) *Davidson v. Stanley*, 1841, 3 Scott, N. R. 49; 58 R. R. 556.

(*b*) *Pearse v. Bouller*, 1860, 2 F. & F. 133. A steward has such implied authority: *Roe d. R. chester v. Pierce*, 1809, 2 Camp. 96; 11 R. R. 673.

(*c*) *Collen v. Gardner*, 1856, 21 Beav. 540; 111 R. R. 195.

(*d*) *Graves v. Masters*, 1883, 1 C. & E. 73.

(*e*) *Wright v. Glyn*, (1902) 1 K. B. 745; 71 L. J. K. B. 497, C. A.

(*f*) *Curtmell's case*, 1874. L. R. 9 Ch. 691; 43 L. J. Ch. 188.

(*g*) *Cox v. Mid. Rail. Co.*, 1849, 3 Ex. 238; 77 R. R. 623. See also *Houghton v. Pilkington*, (1912) 3 K. B. 308; 82 L. J. K. B. 79. *Comp. Langan v. G. W. Rail. Co.*, 1874, 39 L. T. 173; 28 L. T. 577, Ex. Ch.; and Illustration 5.

company, and has authority to receive the payment of premiums within fifteen days of their becoming due. He has no implied authority to accept payment after the expiration of that time (*h*). So, a local agent of an insurance company has no implied authority, as such, to grant, or contract to grant, policies on behalf of the company, that being outside the ordinary scope of his employment and duties (*i*).

15. *Directors and agents of companies*.—A. is the resident agent and manager of a mine for an unincorporated company. He has implied authority to purchase goods necessary for the working of the mine (*k*)—but not to borrow money, however pressing may be the necessity for a loan (*l*)—on the credit of the shareholders. So, directors of an unincorporated mining company have implied authority to employ mining officers, and purchase on the credit of the members of the company goods necessary for working the mine, and to make any other contracts usual or necessary in the management thereof in the ordinary way (*m*), but not to bind the members by negotiable instruments, nor to borrow money on their credit, either for the purpose of carrying on the mine or for any other purpose, however useful and necessary, the general rule being that directors of unincorporated companies have only such powers as are expressly or by necessary implication conferred upon them by the members (*n*). The directors of a banking or ordinary

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(*h*) *Acey v. Fernie*, 1840, 7 M. & W. 151; 56 R. R. 671. See also *London & Lancs. Ass. Co. v. Fleming*, (1897) A. C. 499; 66 L. J. P. C. 116, P. C.

(*i*) *Linford v. Provincial, &c. Ins. Co.*, 1864, 34 Beav. 291.

(*k*) *Hawken v. Bourne*, 1841, 8 M. & W. 703; 58 R. R. 853.

(*l*) *Hawthorne v. Bourne*, 1841, 7 M. & W. 595; 56 R. R. 806; *Ricketts v. Bennett*, 1847, 17 L. J. C. P. 17; 4 C. B. 686; 72 R. R. 691.

(*m*) *Tredwen v. Bourne*, 1840, 6 M. & W. 461; 55 R. R. 689; *Steigenberger v. Carr*, 1841, 3 M. & G. 191.

(*n*) *Dickinson v. Vulphy*, 1829, 5 M. & R. 126; 34 R. R. 348; *Burmaster v. Norris*, 1851, 6 Ex. 796; 21 L. J. Ex. 43.

trading company have, however, implied authority to borrow money for the purpose of the business of the company (*o*). It has been held that directors who have express authority to fix the time and place for, and to adjourn, general meetings of the company, have no implied authority to postpone a general meeting which has been duly convened (*p*).

16. *Arresting offenders, &c.*—A. is a bank manager. He has no implied authority to arrest or prosecute supposed offenders, on behalf of the bank (*q*). Authority to arrest or give persons into custody is only implied when the duties of the agent would not be efficiently performed without such authority (*q*). Thus, a servant has implied authority, as a general rule, to give persons into custody when such a step is necessary for the protection of his master's property, but not merely for the purpose of punishing a supposed wrongdoer (*r*). So, the manager of a restaurant has implied authority to give into custody persons behaving in a riotous manner (*s*).

17. *Servants of railway companies.*—The servants of a railway company have implied authority to remove passengers from carriages in which they are misconducting themselves or travelling without having paid the fare (*t*), and to do whatever else is necessary for the enforcement of the

(*o*) *Ex p. Pitman and Edwards*, 1879, 12 Ch. D. 707; *MacLae v. Sutherland*, 1854, 3 E. & B. 1; 23 L. J. Q. B. 229; 97 R. R. 332; *Royal British Bank v. Turquand*, 1855, 24 L. J. Q. B. 327; 5 E. & B. 240.

(*p*) *Smith v. Paringa Mines*, (1906) 2 Ch. 193; 75 L. J. Ch. 702.

(*q*) *Bank of New South Wales v. Owston*, 1879, 4 App. Cas. 270; 48 L. J. P. C. 25, P. C. And see Illustration 17.

(*r*) *Stevens v. Hinshelwood*, 1891, 55 J. P. 341, C. A.; *Knight v. North Met. Tmvs. Co.*, 1898, 78 L. T. 227; *Hanson v. Waller*, (1901) 1 K. B. 390; 70 L. J. K. B. 231. And see Illustration 17.

(*s*) *Ashton v. Spiers*, 1893, 9 T. L. R. 606. Comp. *Stedman v. Baker*, 1896, 12 T. L. R. 451, C. A.

(*t*) *Lowe v. G. N. Rail. Co.*, 1893, 62 L. J. Q. B. 524.

company's bye-laws (*u*). They have, therefore, implied authority to arrest persons infringing the bye-laws, where that remedy is prescribed by statute (*u*). So, a railway booking clerk, part of whose duty is to keep in a till under his charge money belonging to the company, has implied authority to do all acts necessary for the protection of such money; but he has no implied authority to give into custody a person whom he suspects of having attempted to steal from the till, after the attempt has ceased and there is no further danger to the property of the company (*x*). In *Edwards v. L. & N. W. Rail. Co.* (*y*), it was held that a foreman porter, who was in charge of a station in the absence of the station master, had no implied authority to give into custody a person whom he suspected to be stealing the company's property, because such an act was not within the ordinary scope of his employment or duties.

### Article 38.

#### IMPLIED AUTHORITY WHERE EMPLOYED IN COURSE OF BUSINESS AS AGENT.

Every agent who is authorized to do any act in the course of his trade, profession, or business as an agent, has implied authority to do whatever is usually incidental, in the ordinary course of such trade, profession, or business, to the execution of his express authority (*z*), but not to do anything

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(*u*) *Edwards v. L. & N. W. Rail. Co.*, 1870, L. R. 5 C. P. 445; 39 L. J. C. P. 241.

(*x*) *Allen v. L. & S. W. Rail. Co.*, 1870, L. R. 6 Q. B. 65; 40 L. J. Q. B. 55.

(*y*) 1870, L. R. 5 C. P. 445; 39 L. J. C. P. 241; *Farry v. G. N. Rail.*, (1898) 2 Ir. R. 352.

(*z*) *Young v. Cole*, 1837, 6 L. J. C. P. 201; 3 Bing. N. C. 724; 43

which is unusual in such trade, profession, or business, or which is neither necessary for nor incidental to the execution of his express authority (a).

### Illustrations.

1. A solicitor is authorized to sue for a debt. He has implied authority to receive payment thereof (b).

2. A solicitor is authorized to appear in an action. He has implied authority to refer the subject-matter to arbitration (c), or to enter into a compromise on behalf of his client (d).

3. Counsel is employed to conduct a case. He has implied authority to do everything belonging to the conduct of the case that he thinks best for the client (e).

4. A bailiff is authorized to distrain for rent. He has implied authority to receive the rent and expenses due, and a tender thereof to him operates as a tender to the landlord (f).

5. An insurance broker is authorized to subscribe a policy

R. R. 783; *Sutton v. Tatham*, 1839, 8 L. J. Q. B. 210; 10 Ad. & E. 27; 50 R. R. 312; Illustrations 1 to 7. See, also, pp. 94 *et seq.* for implied authority of factors, brokers, auctioneers, solicitors, &c.

(a) *Wiltshire v. Sims*, 1808, 1 Camp. 258; 10 R. R. 673; *Dawn v. Simmins*, 1879, 41 L. T. 783, C. A.; *Poirier v. Morris*, 1853, 22 L. J. Q. B. 313; 2 El. & Bl. 89; 95 R. R. 449; *Smith v. Webster*, 1876, 3 Ch. Div. 49; 45 L. J. Ch. 528, C. A.; Illustrations 8 to 16. See also pp. 94 *et seq.*

(b) *Yates v. Freckleton*, 1781, 2 Doug. 623.

(c) *Faviell v. Eastern Counties Rail. Co.*, 1848, 2 Ex. 344; 17 L. J. Ex. 297; 76 R. R. 615; *Smith v. Troup*, 1849, 7 C. B. 757; 78 R. R. 824; 18 L. J. C. P. 209.

(d) *Butler v. Knight*, 1867, L. R. 2 Ex. 109; 36 L. J. Ex. 66. And see p. 99.

(e) *Strauss v. Francis*, 1866, L. R. 1 Q. B. 379; 35 L. J. Q. B. 133. And see p. 98.

(f) *Hatch v. Hale*, 1850, 15 Q. B. 10; 19 L. J. Q. B. 289; 81 R. R. 480. As to a tender to a man left in possession by the bailiff, see *Boulton v. Reynolds*, 1859, 29 L. J. Q. B. 11; 2 El. & E. 369; 119 R. R. 765.

for an underwriter. He has implied authority to adjust a loss arising thereunder (*g*), and to refer a dispute about such a loss to arbitration (*h*).

6. A horse-dealer is authorized to sell a horse. He has implied authority to warrant it (*i*).

7. A commission agent is authorized to make a bet in his own name on behalf of his principal. He has implied authority to pay the bet if he loses it (*k*). (No action now lies, however, for the recovery from the principal of any amount so paid, in consequence of the provisions of the Gaming Act, 1892 (*l*).)

8. An auctioneer is employed to sell goods by auction. He has no implied authority to sell them by private contract, even if the public sale proves abortive, and proof of a custom amongst auctioneers to sell privately in such an event, is inadmissible (*m*).

9. A. is employed as a general agent for the sale of goods intrusted to his possession. He has no implied authority to pledge the goods (*n*).

10. A solicitor is authorized to sue for a debt. He has no implied authority to interplead, or agree to postpone execution, after judgment for his client (*o*).

11. A solicitor is authorized to receive payment of interest under a mortgage deed, and is permitted to have possession

(*g*) *Richardson v. Anderson*, 1805, 1 Camp. 43, n.; 10 R. R. 628, n.

(*h*) *Goodson v. Brooke*, 1815, 4 Camp. 163.

(*i*) *Howard v. Sheward*, 1866, L. R. 2 C. P. 148; 36 L. J. C. P. 42.

(*k*) *Read v. Anderson*, 1884, 13 Q. B. D. 779; 53 L. J. Q. B. 532, C. A.

(*l*) 55 Vict. c. 9. See *post*, Article 70.

(*m*) *Daniel v. Adams*, 1764, Ambl. 495; *Marsh v. Jelf*, 1862, 3 F. & F. 234. See, however, *Stein v. Cope*, 1883, 1 C. & E. 63.

(*n*) *City Bank v. Barrow*, 1880, 5 App. Cas. 664, H. L. And see *Waltho v. Brooks*, 1885, 1 T. L. R. 565.

(*o*) *James v. Ricknell*, 1887, 20 Q. B. D. 164; 57 L. J. Q. B. 113; *Lovegrove v. White*, 1871, L. R. 6 C. P. 440; 40 L. J. C. P. 253. But see *Sandford v. Porter*, (1912) 2 I. R. 551.

of the deed. He has no implied authority to receive payment of the principal debt (*p*).

12. A solicitor is authorized to send a draft contract for perusal and approval. He has no implied authority to sign a memorandum of the contract, for the purpose of satisfying the 4th section of the Statute of Frauds (*q*).

13. An architect was employed to make plans for building certain houses. Having made the plans, he instructed a quantity surveyor to take out quantities, and then invited tenders, all of which exceeded the limits of the building owner's proposed expenditure. The quantity surveyor sued the building owner for his fees for taking out the quantities, relying on an alleged custom in the building trade, by which the liability for such fees was thrown on the building owner in cases where no tender was accepted. The jury having found that there was no custom by which an architect was authorized to employ a surveyor without the sanction of the building owner, and the owner not having expressly authorized the employment, it was held that the defendant was not liable (*r*).

14. A broker is authorized to effect a policy. He has no implied authority, after having effected the policy, to cancel it, it not being part of a broker's ordinary authority or duty to cancel contracts once completely and validly made (*s*).

15. A commission agent is authorized to buy goods in England on behalf of a foreign principal. It is not usual to pledge the credit of the foreign principal in such cases. The agent has no implied authority to pledge the principal's

(*p*) *Wilkinson v. Candlish*, 1850, 5 Ex. 91; 19 L. J. Ex. 166; 82 R. R. 588; *Kent v. Thomas*, 1856, 1 H. & N. 473; 108 R. R. 677; *Whitlock v. Waltham*, 1708, 1 Salk. 157.

(*q*) *Smith v. Webster*, 1876, 3 Ch. Div. 49; 45 L. J. Ch. 528, C. A.; *Chinnock v. Ely*, 1865, 4 De G. J. & S. 638. But see *Griffiths Cycle Corp'n. v. Humber*, (1899) 2 Q. B. 414; 68 L. J. Q. B. 959, C. A.; *Daniels v. Trefusis*, (1914) 1 Ch. 788; 83 L. J. Ch. 579.

(*r*) *Antisell v. Doyle*, (1899), 2 Ir. R. 275.

(*s*) *Xenos v. Wickham*, 1886, L. R. 2 H. L. 296; 36 L. J. O. P. 313, H. L.



credit, and the fact that they have agreed to share the profit and loss does not affect this rule (*t*).

16. An estate agent is instructed to find a purchaser for certain property. He receives an offer, which he submits to his principal. The principal then instructs him to withdraw part of the property, and names the lowest price for the remainder. He has no implied authority to enter into a contract for the sale of the property, though the price is specified, because it is not usual for estate agents to enter into contracts on behalf of their principals, unless expressly authorized to do so, their duty being merely to submit to their principals any offers which may be made to them (*u*). But where an owner of certain houses instructed a house and estate agent to sell them, and agreed to pay a commission on the price accepted, it was held that, the agent having submitted an offer to the principal, who notified to him his acceptance of the price offered, the agent had authority to make and sign a contract for sale on the principal's behalf (*x*).

### Article 39.

#### AUTHORITY IMPLIED FROM SPECIAL CUSTOMS.

Every agent has implied authority to act, in the execution of his express authority, according to the usage and customs of the particular place, market, or business in which he is employed (*y*).

(*t*) *Hutton v. Bulloch*, 1874, L. R. 9 Q. B. 572, Ex. Ch.; *Poirier v. Morris*, 1853, 2 El. & Bl. 89; 22 L. J. Q. B. 313; 95 R. R. 449.

(*u*) *Chadburn v. Moore*, 1892, 61 L. J. Ch. 674; *Humer v. Sharp*, 1874, L. R. 19 Eq. 108; 44 L. J. Ch. 53; *Thuman v. Best*, 1907, 97 L. T. 239. See, also, *Vale of Neath Colliery v. Furness*, 1876, 45 L. J. Ch. 276.

(*x*) *Rosenbaum v. Belson*, (1900) 2 Ch. 267; 69 L. J. Ch. 569.

(*y*) Illustrations 1 to 10; *Sutton v. Tatham*, 1839, 10 A. & E. 27; 8 L. J. Q. B. 210; 50 R. R. 312; *Harker v. Edwards*, 1887, 57 L. J. Q. B. 147, C. A.; *Lienard v. Dresslar*, 1862, 3 F. & F. 212.

Provided, that no agent has implied authority to act in accordance with any usage or custom which is unreasonable, unless the principal had notice of such usage or custom at the time when he conferred the authority (*z*), or to act in accordance with any usage or custom which is unlawful.

The question whether any particular usage or custom is unreasonable or unlawful is a question of law. In particular, a usage or custom which changes the intrinsic character of the contract of agency (*a*), or a usage or custom whereby an agent who is authorized to receive payment of money may receive payment by way of set-off, or by way of a settlement of accounts between himself and the person from whom he is authorized to receive payment (*b*), is unreasonable.

### *Illustrations.*

1. A. was authorized to sell manure. The jury found that it was customary to sell manure with a warranty. Held, that A. had implied authority to give a warranty on a sale of the manure (*c*).

2. A. is authorized to sell a certain class of goods. It is customary to sell goods of that class on credit. A. has implied authority to sell the goods on credit (*d*).

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(*z*) *Campbell v. Hassel*, 1816, 1 Stark. 233; *Pollock v. Stables*, 1848, 12 Q. B. 765; 17 L. J. Q. B. 352; 76 R. R. 419; *Robinson v. Mollett*, 1874, L. R. 7 H. L. 802; 44 L. J. C. P. 362, H. L. Illustrations 9 to 12.

(*a*) Illustrations 9 to 11.

(*b*) Illustration 12.

(*c*) *Dingle v. Hare*, 1859, 7 C. B. N. S. 145; 29 L. J. C. P. 143.

(*d*) *Pelham v. Hilder*, 1841, 1 Y. & Coll. C. C. 3; 57 R. R. 208.

3. A share broker is employed to transact business at a particular place. He has implied authority to act in accordance with the reasonable usages of that place (*e*).

4. A bill broker in London was intrusted with bills for discounting. The jury found that it was usual for bill brokers in London to raise money by depositing their customers' bills *en bloc*, the brokers alone being looked to by the customers, and that the parties contracted in reference to such usage. Held, that the broker had implied authority to pledge the bills together with bills of his own and those of other customers (*f*). The authority and duties of a bill broker depend upon the course of dealing and usage of the particular place where he is employed (*f*).

5. A broker, a member of the Stock Exchange, is authorized to sell certain bonds. He has implied authority, if the bonds turn out not to be genuine, to rescind the sale and repay the purchaser the price, in accordance with the usage of the Stock Exchange (*g*).

6. A stockbroker, authorized to buy or sell or carry over shares or stock, has implied authority, according to usage, to execute the order by means of several contracts, or to execute any portion or portions of it (*h*).

7. A broker is authorized to sell shares on the Stock Exchange. He has implied authority to sell under the rules and regulations there in force, except so far as they are unreasonable and unknown to the principal (*i*), and to do all

(*e*) *Pollock v. Stables*, 1848, 12 Q. B. 765; 17 L. J. Q. B. 352; 76 R. R. 419.

(*f*) *Foster v. Pearson*, 1835, 4 L. J. Ex. 120; 1 C. M. & R. 849; 40 R. R. 744.

(*g*) *Young v. Cole*, 1837, 3 Bing. N. C. 724; 43 R. R. 783; 6 L. J. C. P. 201.

(*h*) *Benjamin v. Barnett*, 1903, 19 T. L. R. 564.

(*i*) *Harker v. Edwards*, 1887, 57 L. J. Q. B. 147, C. A.; *Hodgkinson v. Kelly*, 1868, 37 L. J. Ch. 837; *Coles v. Bristowe*, 1868, L. R. 4 Ch. 3; 38 L. J. Ch. 81; *M'Ewen v. Woods*, 1847, 11 Q. B. 13; 17 L. J. Q. B. 206; 75 R. R. 274.

things necessary to complete the contract according to such rules and regulations (*k*).

8. A broker is authorized to buy wool in the Liverpool market. By a custom of that market, a broker so authorized may buy either in his own name or in the name of the principal without giving his principal notice whether he has bought in his own name or not. Such a custom is not unreasonable, and the principal is bound by a contract made in the name of the broker, though he had no notice of the custom or of the fact that the contract was made by the broker in his own name (*l*).

9. A broker is authorized to buy 50 tons of tallow. It is customary in the tallow trade for a broker to make a single contract in his own name for the purchase of a sufficiently large quantity of tallow to supply the orders of several principals, and to parcel it out amongst them. The broker has no implied authority to purchase a larger quantity than 50 tons and allocate 50 tons thereof to the principal, unless the principal was aware of the usage at the time when he gave the authority, because the effect of such a usage is to change the intrinsic character of the contract of agency by turning the agent into a principal, and thus giving him an interest at variance with his duty (*m*).

10. By the usage of the Stock Exchange, a broker who is instructed by several principals to buy or sell or carry over shares in the same undertaking, may make one contract in his own name for the total number of shares and apportion them amongst the principals, and may include in the contract

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(*k*) *Bowring v. Shepherd*, 1871, L. R. 6 Q. B. 309; 40 L. J. Q. B. 129, Ex. Ch.

(*l*) *Cropper v. Cook*, 1868, L. R. 3 C. P. 194.

(*m*) *Robinson v. Mollett*, 1874, L. R. 7 H. L. 802; 44 L. J. C. P. 362, H. L.; *Bostock v. Jardine*, 1865, 34 L. J. Ex. 142; 3 H. & C. 700. Comp. Illus. 10.

shares in which he is dealing on his own account; and thereupon the jobber with whom he deals and each principal become bound to carry out such portion of the contract as is appropriated to them respectively. The usage is reasonable and binding on a principal, whether he was aware of it or not (*n*). In this illustration, the result of the usage is that although in form there is only one contract, in effect there are separate contracts between the jobber and each principal, on which they may sue and be sued, whereas in Illustration 9 the result of the usage was that there was no contract on which the principal could sue the other contracting party at all.

11. A broker is authorized to sell stock. A custom of the Stock Exchange, whereby he is himself permitted to take over the stock at the price of the day if he is unable to find a purchaser, is unreasonable, and such a transaction is not binding on the principal unless he is proved to have had notice of the custom (*o*).

12. An insurance broker is authorized to receive from the underwriters payment of money due under a policy. A custom at Lloyd's whereby the broker may settle with the underwriters by way of set-off is unreasonable, and the principal is not bound by such a settlement unless he was aware of the custom when he authorized the broker to receive payment (*p*). The same rule applies to stockbrokers settling with agents (*q*).

(*n*) *Scott v. Godfrey*, (1901) 2 K. B. 726; 70 L. J. K. B. 954; *Beckhuson v. Hamblett*, (1901) 2 K. B. 73; 70 L. J. K. B. 600, C. A. See also *Ex p. Rogers, Re Rogers*, 1880, 15 Ch. D. 207, C. A.; *May v. Angeli*, 1898, 14 T. L. R. 551, H. L.; *Consolidated Goldfields v. Spiegel*, 1909, 100 L. T. 351.

(*o*) *Hamilton v. Young*, 1881, L. R. 7 Ir. 289, Ir.

(*p*) See Article 32, Illustration 8, and cases there cited.

(*q*) See Article 32, Illustration 7, and cases there cited.

*Implied authority of particular classes of agents,  
as incidental to their employment.*

1. Factors.

Where goods are intrusted to a factor for sale, he has implied authority—

1. To sell them in his own name (*r*).
2. To sell at such times and for such prices as he thinks best (*s*).
3. To sell on reasonable credit (*t*).
4. To warrant the goods sold, if it is usual to warrant that class of goods (*u*).
5. To receive payment of the price, if he sells in his own name (*x*).

A factor has no implied authority, as such—

1. To delegate his authority, whether acting under a *del credere* commission or not (*y*).
2. To barter (*z*) or pledge goods (*a*), or the bill of lading for goods (*b*), intrusted to him for sale. Even if he has accepted bills drawn by the principal to be provided for out of the proceeds of the goods, he has no implied authority to

(*r*) *Baring v. Corrie*, 1818, 2 B. & A. 137; 20 R. R. 383; *Ex p. Dixon, Re Henley*, 1876, 4 Ch. Div. 133; 46 L. J. Bk. 20, C. A.

(*s*) *Smart v. Sandars*, 1846, 17 L. J. C. P. 258; 3 C. B. 380; 75 R. R. 849.

(*t*) *Houghton v. Matthews*, 1803, 3 B. & P. 485, 489; 7 R. R. 815; *Scott v. Surman*, 1742, Willes, 400.

(*u*) *Dingle v. Hare*, 1859, 7 C. B. N. S. 145; 29 L. J. C. P. 143.

(*x*) *Drinkwater v. Goodwin*, 1775, Cowp. 251.

(*y*) *Cockran v. Irlam*, 1813, 2 M. & S. 301; 15 R. R. 257; *Solly v. Rathbone*, 1814, 2 M. & S. 298.

(*z*) *Guerreiro v. Peile*, 1820, 3 B. & A. 616; 22 R. R. 500.

(*a*) *Martini v. Coles*, 1813, 1 M. & S. 140; *Paterson v. Tash, Str.* 1178; *Guichard v. Morgan*, 1819, 4 Moo. 36. See, however, Article 85 as to the rights of third persons dealing with him in good faith.

(*b*) *Newsom v. Thornton*, 1805, 6 East, 17; 8 R. R. 378.

raise money by pledging the goods for the purpose of meeting the bills (c).

## 2. Brokers.

A broker has implied authority—

1. Where he has entered into a contract, to sign an entry in his book, or to sign bought and sold notes, on behalf of both buyer and seller, as a memorandum of the contract for the purpose of satisfying the provisions of the 4th section of the Sale of Goods Act, 1893 (d).

2. To sell on reasonable credit, where there is no usage to the contrary (e).

3. Where he sells for an undisclosed principal, to receive payment of the price in accordance with the terms of the contract (f).

4. To act in accordance with the usage, and the rules and regulations, of the market in which he deals, except so far as the usage, rules or regulations are illegal or unreasonable, or alter the intrinsic nature of the contract of agency (g).

5. To close his account with the principal, but not to close part of it only, if the principal fails to duly pay differences (h).

A broker has no implied authority, as such—

1. To contract in his own name (i).

(c) *Gill v. Kymer*, 1821, 5 Moore, 503; *Fielding v. Kymer*, 1821, 2 B. & B. 639.

(d) *Purton v. Crofts*, 1864, 33 L. J. C. P. 189; 16 C. B. N. S. 11; *Thompson v. Gardiner*, 1876, 1 C. P. D. 777. See other cases cited under Article 94.

(e) *Boorman v. Brown*, 1842, 3 Q. B. 511; 61 R. R. 287, H. L. *Wiltshire v. Sims*, 1808, 1 Camp. 258; 10 R. R. 673.

(f) *Campbell v. Hassel*, 1816, 1 Stark. 233.

(g) See cases cited under Article 39.

(h) Article 9, Illustration 12.

(i) *Bariny v. Corrie*, 1818, 2 B. & A. 137; 20 R. R. 338.

2. To cancel contracts made by him (*k*).
3. To pay total or partial losses on behalf of his underwriters (*l*).
4. To receive payment for an undisclosed principal otherwise than in accordance with the terms of the original contract, or to receive payment by way of set-off (*m*).
5. To delegate his authority, whether acting under a *del credere* commission or not (*n*).
6. To pledge bills intrusted to him to get discounted (*o*), in the absence of a particular custom sanctioning such a pledge (*p*).
7. To sell stock or shares on credit, even if he considers it for the principal's benefit (*q*).
8. To receive payment of the price of goods sold by him, when the principal is disclosed (*r*).

### 3. Auctioneers.

An auctioneer has implied authority at a sale by auction to sign a contract or memorandum thereof on behalf of both vendor and purchaser, and his signature is a sufficient compliance with the provisions of the 4th section of the Statute of Frauds, or of the 4th section of the Sale of Goods Act,

(*k*) *Xenos v. Wickham*, 1866, L. R. 2 H. L. 296; 36 L. J. C. P. 313, H. L.

(*l*) *Bell v. Auldjo*, 1784, 4 Doug. 48.

(*m*) *Campbell v. Hassel*, 1816, 1 Stark. 233; *Pearson v. Scott*, 1878, 9 Ch. Div. 198; 47 L. J. Ch. 705; Article 32, Illustrations 7 and 8.

(*n*) *Henderson v. Barnewell*, 1827, 1 Y. & J. 387; 30 B. R. 779; *Cockran v. Irlam*, 1813, 2 M. & S. 301; 15 R. R. 257.

(*o*) *Haynes v. Foster*, 1833, 3 L. J. Ex. 153; 2 C. & M. 237; 40 B. R. 755.

(*p*) *Foster v. Pearson*, 1835, 1 C. M. & R. 849; 42 L. Ex. 120; 40 B. R. 744.

(*q*) *Wiltshire v. Sims*, 1808, 1 Camp. 258; 10 R. R. 673.

(*r*) *Linck v. Jameson*, 1886, 2 T. L. R. 206, C. A.



1893, in an action against either party either for specific performance or for damages for breach of contract (*s*).

An auctioneer has no implied authority, as such—

1. To rescind a sale made by him (*t*).
2. To warrant goods sold by him (*u*).
3. To take a bill of exchange in payment, where it is provided that the price shall be paid to him (*x*).
4. To sign the vendor's name to any contract except the contract of sale (*y*).
5. To sell by private contract, even if the public sale proves abortive and he is offered more than the reserve price (*z*).
6. To deliver goods sold without payment, or to allow a set-off due from the vendor to the purchaser (*a*).
7. To deal, after sale, with the terms on which a title shall be made (*b*). He is an agent for sale only (*b*).

(*s*) *Kemey's v. Proctor*, 1820, 1 Jac. & Walk. 350; *Shelton v. Livius*, 1832, 2 C. & J. 411; 37 R. R. 746; *Emmerson v. Heelis*, 1809, 2 Taunt. 38; 11 R. R. 520; *White v. Proctor*, 1811, 4 Taunt. 209; 13 R. R. 580; *Wallace v. Roe*, (1903) 1 Ir. R. 32.

(*t*) *Nelson v. Aldridge*, 1818, 2 Stark. 435; 20 R. R. 709.

(*u*) *Payne v. Leconfield*, 1882, 51 L. J. Q. B. 642.

(*x*) *Williams v. Evans*, 1866, L. R. 1 Q. B. 352; 35 L. J. Q. B. 111; *Sykes v. Giles*, 1839, 5 M. & W. 645; 9 L. J. Ex. 106; 52 R. R. 870.

(*y*) *Megan v. Mulloy*, 1878, L. R. 2 Ir. 530. See also *Van Praugh v. Everidge*, (1903) 1 Ch. 434; 72 L. J. Ch. 260, C. A.

(*z*) *Mursh v. Jelf*, 1862, 3 F. & F. 234; *Daniel v. Adams*, 1764, Amb. 495.

(*a*) *Brown v. Staton*, 1816, 2 Chit. 353; 23 R. R. 757.

(*b*) *Seton v. Slade*, 1802, 7 Ves. 265, 276; 6 R. R. 124.

## 4. Counsel.

Where counsel is employed to conduct a case, he has implied authority, subject to any express instructions to the contrary (*c*)—

1. To consent to a non-suit (*d*), or to the withdrawal of a juror (*e*).

2. To compromise or abandon the claims of his client, or give an undertaking on his behalf, in respect of all matters within the scope of the suit or matter (*f*), but not in respect of anything beyond the scope thereof (*g*).

3. To enter into an agreement with the counsel on the other side as to the subject-matter of the suit or matter, or as to costs (*h*), but not as to anything beyond the scope of the suit or matter (*i*).

4. To consent to an order (*k*).

5. Generally, to do all other things appertaining to the conduct of the case according to his absolute discretion (*l*).

(*c*) See *Neale v. Gordon-Lennox*, (1902) A. C. 465; 71 L. J. K. B. 939, H. L.; *Lewis v. Lewis*, 1890, 45 Ch. D. 281; 59 L. J. Ch. 712.

(*d*) *Lynch v. Coel*, 1865, 12 L. T. 548.

(*e*) *Strauss v. Francis*, 1866, L. R. 1 Q. B. 379; 35 L. J. Q. B. 133.

(*f*) *Re Wood, Ex p. Wenham*, 1872, 21 W. R. 104; *Chambers v. Mason*, 1858, 28 L. J. C. P. 10; 5 C. B. N. S. 59; 116 R. R. 569; *Hargrave v. Hargrave*, 1850, 19 L. J. Ch. 261; 12 Beav. 408; 85 R. R. 131; *Matthews v. Munster*, 1887, 20 Q. B. D. 141; 57 L. J. Q. B. 49, C. A.

(*g*) *Ellender v. Wood*, 1888, 4 T. L. R. 680, C. A.

(*h*) *Strauss v. Francis, infra*; *Swinfen v. Swinfen*, 1858, 27 L. J. Ch. 35; 2 De G. & J. 381; 119 R. R. 160; *Re West Devon Mine*, 1888, 38 Ch. D. 51; 57 L. J. Ch. 850, C. A.

(*i*) *Kempshall v. Holland*, 1895, 14 R. 336, C. A.

(*k*) *Mole v. Smith*, 1820, 1 Jac. & Walk. 673; 28 R. R. 37, n.; *Re Hobler*, 1844, 8 Beav. 101; *Furnival v. Bogle*, 1827, 4 Russ. 142; 28 R. R. 34.

(*l*) *Strauss v. Francis*, 1866, L. R. 1 Q. B. 379; 35 L. J. Q. B. 133; *Lynch v. Coel*, 1865, 12 L. T. 548.

## 5. Solicitors.

A solicitor has implied authority—

1. To receive payment of a debt for which he is instructed to sue (*m*).

2. To receive the consideration for a deed upon its production duly executed and containing a receipt for such consideration by the person entitled to give a receipt therefor (*n*).

3. Where he is authorized to conduct an action—

(a) to compromise (*o*), or refer the subject-matter thereof to arbitration (*p*);

(b) to abandon the claims of his client, provided that they are within the scope of the action, but not where they are collateral thereto (*q*);

(c) to enter into an undertaking in reference to the subject-matter thereof (*r*).

(*m*) *Yates v. Freckleton*, 1781, 2 Doug. 623. Also the solicitor's London agent who issues and indorses the writ: *Weary v. Alderson*, 1837, 2 M. & Rob. 127.

(*n*) Conveyancing Act, 1881, s. 56; Trustee Act, 1893, s. 17, extending the principle to solicitors of trustees.

(*o*) *Butler v. Knight*, 1867, L. R. 2 Ex. 109; 36 L. J. Ex. 66; *Prestwich v. Poley*, 1865, 34 L. J. C. P. 189; 18 C. B. N. S. 806; *Chown v. Parrott*, 1863, 32 L. J. C. P. 197; 14 C. B. N. S. 74; *Re Newen*, (1903) 1 Ch. 812; 72 L. J. Ch. 356; *Welsh v. Roe*, 1918, 87 L. J. K. B. 520. See also *Little v. Spreadbury*, (1910) 2 K. B. 658; 79 L. J. K. B. 1119. Comp. *Re A Debtor*, (1914) 2 K. B. 758; 83 L. J. K. B. 1176.

(*p*) *Fawcett v. Eastern Counties Rail. Co.*, 1848, 2 Ex. 344; 17 L. J. Ex. 297; 76 R. R. 615; *Smith v. Troup*, 1849, 7 C. B. 757; 18 L. J. C. P. 209; 78 R. R. 824.

(*q*) *Re Wood, Ex p. Wenham*, 1872. 21 W. R. 104.

(*r*) *Re Commonwealth Land, &c. Co., Ex p. Hollington*, 1873, 43 L. J. Ch. 99.

4. Where he is authorized to proceed to satisfaction—
  - (a) to issue and indorse a writ of *fi. fa.*, and do all other acts necessary to obtain the fruits of the judgment (s);
  - (b) to order the sheriff to withdraw from possession under a writ of *fi. fa. (t)*; but his managing clerk has no such implied authority, though left in charge of the office and business during the temporary absence of his employer (u);
  - (c) to compromise, after judgment (x).

A solicitor has no implied authority, as such—

1. To interplead or agree to postpone execution after a judgment in his client's favour, he being then *functus officio*, unless authorized to proceed (y).

2. To direct the sheriff to seize particular goods, when issuing a writ of *fi. fa.*, or otherwise to interfere with the sheriff in the performance of his duties (z).

3. To institute any action or suit (a).

4. To compromise a claim on behalf of his client before an action has been commenced in respect thereof (b).

5. To sign a memorandum of a contract of which he is instructed to prepare a draft, so as to satisfy the provisions of the Statute of Frauds (c).

(s) *Jarman v. Hooper*, 1843, 1 D. & L. 769; 64 R. R. 861; *Morris v. Salberg*, 1889, 22 Q. B. D. 614, C. A.

(t) *Levi v. Abbott*, 1849, 4 Ex. 588; 19 L. J. Ex. 62; 80 R. R. 706.

(u) *Whyte v. Nutting*, (1897) 2 Ir. R. 241.

(x) *Butler v. Knight*, 1867, L. R. 2 Ex. 109; 36 L. J. Ex. 66. Comp. *Re A Debtor*, (1914) 2 K. B. 758; 83 L. J. K. B. 1176.

(y) *James v. Ricknell*, 1887, 20 Q. B. D. 164; 57 L. J. Q. B. 113; *Lovegrove v. White*, 1871, L. R. 6 C. P. 550; 40 L. J. C. P. 253. But see *Sandford v. Porter*, (1912) 2 I. R. 551.

(z) *Smith v. Keal*, 1882, 9 Q. B. D. 340, C. A.

(a) *Wright v. Castle*, 1817, 3 Meriv. 12; 17 R. R. 3; *Atkinson v. Abbott*, 1855, 3 Drew. 251; 106 R. R. 329.

(b) *Macaulay v. Polley*, (1897) 2 Q. B. 122; 66 L. J. Q. B. 665, C. A.

(c) *Howard v. Braithwaite*, 1812, 1 Ves. & B. 202; *Smith v. Webster*, 1876, 3 Ch. Div. 49; 45 L. J. Ch. 528, C. A. But see *Griffiths Cycle Corp'n. v. Humber*, (1899) 2 Q. B. 414; 68 L. J. Q. B. 959, C. A.

## AUTHORITY.

6. To receive the purchase-money for property ~~sold~~ (except on production of a deed, as above (*d*)).

7. To receive payment of a mortgage debt, though authorized to receive payment of the interest and permitted to have possession of the mortgage deed (*e*).

8. To take a cheque in lieu of cash in payment of a mortgage debt, of which he is authorized to receive payment (*f*).

9. To pledge the credit of his client to counsel for fees (*g*).

10. To take special journeys, or go to foreign parts, on his client's behalf (*h*).

## 6. Shipmasters.

The extent of a shipmaster's authority to sell or hypothecate the ship or cargo (*i*), or to bind his principals personally by contract (*k*), is determined by the law of the country to which the ship belongs (*l*), and the ship's flag operates as notice to all the world that the master's authority is limited by the law of that flag (*k*). Thus, if an English cargo be hypothecated by the master of an Italian ship, the validity

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(*d*) *Viney v. Chaplin*, 1858, 27 L. J. Ch. 434; 2 De G. & J. 468; 119 R. R. 213; *Ex p. Swinbanks, Re Shanks*, 1879, 11 Ch. D. 525; 48 L. J. Bk. 120, C. A.

(*e*) *Wilkinson v. Candlish*, 1850, 5 Ex. 91; 19 L. J. Ex. 166; 82 R. R. 588; *Kent v. Thomas*, 1856, 1 H. & N. 473; 108 R. R. 677.

(*f*) *Blumberg v. Life Interests, &c. Corpn.*, (1897) 1 Ch. 171; (1898) 1 Ch. 27; 66 L. J. Ch. 127; 67 *ib.* 118, C. A.

(*g*) *Mostyn v. Mostyn, Ex p. Barry*, 1870, L. R. 5 Ch. 457; 39 L. J. Ch. 780.

(*h*) *Re Snell*, 1877, 5 Ch. Div. 815, C. A.; *Re Price*, 1845, 9 Beav. 234; *Re Bevan*, 1855, 20 Beav. 146.

(*i*) *The Karnak*, 1869, L. R. 2 P. C. 505; 38 L. J. Ad. 57, P. C.; *The Gaetano and Maria*, 1882, 7 P. D. 137; 51 L. J. Ad. 67, C. A.; *The August*, (1891) P. 328; 60 L. J. P. 57.

(*k*) *Lloyd v. Guibert*, 1865, 33 L. J. Q. B. 241; 6 B. & S. 100, 120, Ex. Ch.

(*l*) See note (*i*), *ante*.

of the bond is governed by Italian law, and if found to be valid by that law, it will be enforced by the English Courts, although the conditions required for its validity by English law were not fulfilled (*m*).

A shipmaster is appointed for the purpose of conducting the voyage on which the ship is engaged to a favourable termination, and has implied authority to do all things necessary for the due and proper prosecution of that voyage (*n*). He has also implied authority to enter into contracts in respect of the usual employment of the ship (*o*). But he can only bind personally those persons who appointed him or were privy to his appointment (*p*). The mere fact that a person is a registered owner of the vessel is not sufficient to render him liable on the master's contracts; it must appear that the master is or has been held out as his agent (*p*). Thus, if the ship is chartered, and the possession and control thereof given up to the charterers, who appoint the master, the owners are not liable on a bill of lading or other contract entered into by the master (*q*). The same principle applies if the vessel is chartered, and the possession and control given up, to the master himself (*r*).

(*m*) *The Gaetano and Maria*, 1882, 7 P. D. 137; 51 L. J. Ad. 67, C. A.

(*n*) *Arthur v. Barton*, 1840, 6 M. & W. 138; 55 R. R. 542; *Beldon v. Campbell*, 1851, 6 Ex. 886; 86 R. R. 534. Whether he has implied authority to make an agreement binding his owners to arbitration, *quære*; *The City of Calcutta*, 1899, 79 L. T. 517, C. A.

(*o*) *Grant v. Norway*, 1851, 20 L. J. C. P. 93; 10 C. B. 665; 84 R. R. 747; *McLean v. Fleming*, 1871, 2 H. L. Sc. App. 128.

(*p*) *Mackenzie v. Pooley*, 1856, 11 Ex. 638; 25 L. J. Ex. 124; 105 R. R. 698; *Mitcheson v. Oliver*, 1855, 5 E. & B. 419, Ex. Ch.; *Myers v. Willis*, 1856, 25 L. J. C. P. 255; 18 C. B. 886; *Baker v. Buckle*, 1822, 7 Moo. 349; 24 R. R. 685. As to holding out, see Article 88, Illustration 4.

(*q*) *Baumwoll Manufactur v. Furness*, (1893) A. C. 8; 62 L. J. Q. B. 201, H. L. Comp. Illustration 4 to Article 88.

(*r*) *Frazer v. Marsh*, 1811, 13 East, 238; 12 R. R. 336; *Reeve v. Davis*, 1834, 1 A. & E. 312; 40 R. R. 300; *Colvin v. Newberry*, 1832,

The master of a British ship has implied authority—

1. To contract for the conveyance of merchandise according to the usual employment of the ship (*s*).

2. To enter into a charter-party on behalf of the owners when he is in a foreign port and there is difficulty in communicating with the owners (*t*).

3. To render salvage services to vessels in distress (*u*).

4. To enter into reasonable towage agreements (*x*).

5. To enter into reasonable salvage agreements, if necessary for the owners' benefit; but not merely for the purpose of saving the lives of the master and crew without regard to saving the owners' property. A salvage agreement operates as a charge on the property saved, and is only binding to the extent of the value of that property (*y*).

6. To pledge his principals' credit, at home or abroad, for fit and proper repairs and stores necessary for the equipment of the vessel on her voyage, and such as a prudent owner himself would order (*z*), provided that it is reasonably necessary to obtain them on the principals' credit (*a*).

1 C. & F. 283; 33 R. R. 437. *Comp. Steel v. Lester*, 1877, 3 C. P. D. 121; 47 L. J. C. P. 43; *Associated Portland Cement Manufrs. v. Ashton*, (1915) 2 K. B. 1; 84 L. J. K. B. 519, C. A.

(*s*) *Runquist v. Ditchell*, 1801, 3 Esp. 64.

(*t*) *The Fanny, The Mathilda*, 1883, 5 Asp. M. C. 75; *Grant v. Norway*, 1851, 10 C. B. 665; 20 L. J. C. P. 93; 84 R. R. 747.

(*u*) *The Thetis*, 1869, L. R. 2 Ad. 365; 38 L. J. Ad. 42.

(*x*) *Wellfield v. Adamson (The Alfred)*, 1884, 5 Asp. M. C. 214; *The Arthur*, 1862, 6 L. T. 556.

(*y*) *The Renpor*, 1883, 8 P. D. 115; 52 L. J. P. 49; *The Mariposa*, (1896) P. 273; 65 L. J. P. 104; *The Inchmaree*, (1899) P. 111; 68 L. J. P. 30. The Court will not enforce unreasonable or inequitable contracts for salvage or towage services: *The Medina*, 1876, 2 P. D. 5, C. A.; *The Silesia*, 1880, 5 P. D. 177; *The Crusader*, (1907) P. 196, C. A.

(*z*) *Frost v. Oliver*, 1853, 22 L. J. Q. B. 353; 1 C. L. R. 1003; *Webster v. Seekamp*, 1821, 4 B. & A. 352; 23 R. R. 307; *The Riga*, 1872, L. R. 3 Ad. 516; 41 L. J. Ad. 39.

(*a*) *Gunn v. Roberts*, 1874, L. R. 9 C. P. 331; 43 L. J. C. P. 233; *Edwards v. Havill*, 1853, 23 L. J. C. P. 8; 14 C. B. 107; 98 R. R.

7. To borrow money on his principals' credit, at home or abroad, if the advance is necessary for the prosecution of the voyage, communication with the principals is not practicable, and they have no solvent agent on the spot (*b*). To render the principals liable for such an advance, the lender must prove—(1) that there was a reasonable necessity, according to the ordinary course of prudent conduct, to borrow on their credit (*c*) (this is a question of fact for a jury (*b*)); (2) that the amount was advanced expressly for the use of the ship (*d*); and (3) that the money was expended on the ship (*e*). There is no implied authority to pledge the credit of the principals when they can reasonably be communicated with (*b*), or for the purpose of paying for services already rendered (*b*), or when there is a solvent agent on the spot (*c*). But the state of accounts between the master and his principals does not affect his implied authority to borrow on their credit (*f*).

8. To hypothecate the ship, cargo, and freight (bottomry) when communication with the respective owners is impracticable (*g*), and it is necessary to obtain supplies or repairs in order to prosecute the voyage, and impossible to obtain them on personal credit, or in any other way than by hypo-

561; *Mackintosh v. Mitcheson*, 1849, 4 Ex. 175; 18 L. J. Ex. 385; 80 R. R. 513.

(*b*) *Arthur v. Barton*, 1840, 6 M. & W. 138; 55 R. R. 542; *Beldon v. Campbell*, 1851, 6 Ex. 886; 86 R. R. 534; *Stonehouse v. Gent*, 1841, 2 Q. B. 431; 57 R. R. 718; *Johns v. Simons*, 1842, 2 Q. B. 425; 57 R. R. 714; *Edwards v. Havill*, 1853, 14 C. B. 107; 98 R. R. 561; *Rocher v. Busher*, 1815, 1 Stark. 27; 18 R. R. 742; *Robinson v. Lyall*, 1819, 7 Price, 592.

(*c*) See note (*a*), *supra*.

(*d*) *Thacker v. Moates*, 1831, 1 M. & Rob. 79.

(*e*) *Bogle v. Atty*, 1818, Gow, 50.

(*f*) *Williamson v. Page*, 1844, 1 C. & K. 581.

(*g*) *Kleinwort v. Cassa Marittima Genoa*, 1877, 2 App. Cas. 156, P. C.; *The Staffordshire*, 1872, L. R. 4 P. C. 194; 41 L. J. Ad. 49, P. C.; *The Panama*, 1870, L. R. 3 P. C. 199; 39 L. J. Ad. 37; *The Olivier*, 1862, 31 L. J. Ad. 137.



thecation (*h*). But there is no implied authority to hypothecate either ship or cargo for necessities already supplied (*h*); or without communicating with the respective owners where practicable (*i*), or for the purpose of obtaining personal freedom from arrest (*j*), or where it is possible to obtain supplies in any other way (*h*). Where ship and cargo are hypothecated for repairs, the shipowners are bound to indemnify the owners of the cargo from liability under the bond (*k*).

9. To hypothecate the cargo alone (*respondentia*), when it is necessary for the benefit of the cargo or for the prosecution of the voyage (*l*), and communication with the owners is impracticable (*m*). The master has no implied authority to hypothecate or do any act seriously affecting the value of the cargo without first communicating, if practicable, with the owners thereof (*m*).

10. To sell the ship, in cases of absolute or urgent necessity, when it is not practicable to communicate with the owners (*n*). The master is justified in selling the ship only in cases of urgent necessity, and the burden of proof lies on the party seeking to uphold the sale (*o*). It must be such a

(*h*) *The Hersey*, 1837, 3 Hagg. Ad. 404; *Hussey v. Christie*, 1807, 13 Ves. 599; 9 R. R. 585; *The Ida*, 1872, L. R. 3 Ad. 542; *Lyall v. Hicks*, 1859, 27 Beav. 616; *The Faithful*, 1862, 31 L. J. Ad. 81; *Soares v. Rahn*, 1838, 3 Moo. P. C. C. 1, P. C.; *Heathorn v. Durling*, 1836, 1 Moo. P. C. C. 5; *Stainbank v. Shepard*, 1853, 22 L. J. Ex. 341; 13 C. B. 418; 93 R. R. 599, Ex. Ch.

(*i*) See note (*g*) on p. 104.

(*j*) *Smith v. Gould*, 1842, 4 Moo. P. C. C. 21; 59 R. R. 326, P. C.

(*k*) *Duncan v. Benson*, 1 Ex. 537; 74 R. R. 754. Affirmed *sub nom.* *Benson v. Duncan*, 1849, 3 Ex. 644; 18 L. J. Ex. 169; 77 R. R. 776, Ex. Ch.

(*l*) *The Sultan*, 1859, Swa. 504; *The Gratitude*, 1801, 3 Rob. 240.

(*m*) *The Onward*, 1873, L. R. 4 Ad. 38; 42 L. J. Ad. 61; *The Hamburg*, 1863, 33 L. J. Ad. 116; 2 Moo. P. C. C. (N. S.) 289, P. C.

(*n*) *The Australia*, 1859, 13 Moo. P. C. C. 132, P. C.; *The Margaret Mitchell*, 1858, Swa. 382.

(*o*) *Cobequid Marine Ins. Co. v. Burteaux*, 1875, L. R. 6 P. C. 319; *Knight v. Faith*, 1850, 15 Q. B. 649; 19 L. J. Q. B. 509; 81 R. R.

necessity as leaves him no alternative as a prudent and skilful man, acting in good faith for the best interests of all concerned, and with the best judgment that can be formed under the circumstances, except to sell the ship as she lies. If he sells hastily, either without sufficient examination into the condition of the ship, or without having previously made every exertion in his power with the means then at his disposal to extricate her, the sale is invalid, even if the danger at the time appeared exceedingly imminent (*p*). But if in consequence of damage it is impossible to prosecute the voyage, or there is no prospect of completing it (*q*), or if the ship is in a foreign port, and cannot be repaired except at such a cost as no prudent person would venture to incur, the master has implied authority to sell her (*r*).

11. To sell part of the cargo—but not the whole—where repairs are absolutely necessary for the prosecution of the voyage, and communication with the owners of the cargo is impracticable (*s*). But it is only in cases of extreme necessity, and only after he has done everything in his power to carry the cargo to its destination, that he has implied authority to sell any portion thereof (*t*). He has no implied

725. Held necessary in *The Glasgow*, 1856, Swa. 145; *The Victor*, 1865, 13 L. T. 21; *The Australia*, 1859, 13 Moo. P. C. C. 132, P. C.; *Ireland v. Thomson*, 1847, 4 C. B. 149; 17 L. J. C. P. 241; 72 R. R. 560; *Robertson v. Clarke*, 1824, 1 Bing. 445. Sale set aside as unnecessary in *The Bonita*, *The Charlotte*, 1861, 30 L. J. Ad. 145; *The Eliza Cornish*, or *The Segredo*, 1853, 1 Spinks, 36.

(*p*) *Cobequid Marine Ins. Co. v. Barteaux*, 1875, L. R. 6 P. C. 319.

(*q*) *Ireland v. Thomson*, 1847, 17 L. J. C. P. 241; 4 C. B. 149; 72 R. R. 560; *Hunter v. Parker*, 1840, 7 M. & W. 322; 56 R. R. 723.

(*r*) *The Australia*, 1859, 13 Moo. P. C. C. 132, P. C.; *Idle v. Royal Exchange Ass. Co.*, 1819, 3 Moo. 115; 21 R. R. 538.

(*s*) *The Gratitude*, 1801, 3 Rob. 240; *Australasian S. N. Co. v. Morse*, 1872, L. R. 4 P. C. 222, P. C.; *Duncan v. Benson*, 1 Ex. 537; 17 L. J. Ex. 238; 74 R. R. 754; affirmed *sub nom. Benson v. Duncan*, 1849, 3 Ex. 644; 77 R. R. 776, Ex. Ch.

(*t*) *Atlantic Mutual Ins. Co. v. Huth*, 1879, 16 Ch. D. 474, C. A.; *Wilson v. Millar*, 1816, 2 Stark. 1; 19 R. R. 670; *Joseph v. Knox*,

authority, in any case, to stop the voyage and sell the whole of the cargo in a foreign port, even if it is impossible to prosecute the original voyage, and the sale is most beneficial for the owners under the circumstances (*t*). The authority of the master as an agent of the owners of the cargo is strictly an authority of necessity (*u*).

The master of a British ship has no implied authority—

1. To vary any contract made by the owners (*x*).
2. To agree for the substitution of another voyage in place of that agreed upon between the owners and freighters, or make any contract outside the scope of that voyage (*y*).
3. To hold out any person as an agent to charter the vessel (*z*).
4. To sign a bill of lading at a lower freight than the owner contracted for (*a*), or making the freight payable to any other person than the owner (*b*).
5. To sign a bill of lading for goods not actually received (*c*), or for a greater quantity than are actually received, on board (*d*). His authority is limited to signing for goods actually received on board, and all persons taking a bill of

1813, 3 Camp. 320; 53 R. R. 250; *Van Omeron v. Dowick*, 1809, 2 Camp. 42; 11 R. R. 656; *Cannan v. Meaburn*, 1823, 1 Bing. 243; *Acalos v. Burns*, 1878, 3 Ex. D. 282; 47 L. J. Ex. 566, C. A.

(*u*) *Gibbs v. Grey*, 1857, 26 L. J. Ex. 286; 2 H. & N. 22; 115 R. R. 408; *Freeman v. E. I. Co.*, 1822, 5 B. & A. 617; 24 R. R. 497;

(*x*) *Grant v. Norway*, 1851, 10 C. B. 665; 20 L. J. C. P. 93; 84 R. R. 747; *Pearson v. Göschel*, 1864, 33 L. J. C. P. 265; 17 C. B. N. S. 352.

(*y*) *Burton v. Sharpe*, 1810, 2 Camp. 529; 11 R. R. 788.

(*z*) *The Fanny, The Mathilda*, 1883, 5 Asp. M. C. 75.

(*a*) *Pickernell v. Jauberry*, 1862, 3 F. & F. 217.

(*b*) *Reynolds v. Jex*, 1865, 34 L. J. Q. B. 241; 7 B. & S. 86.

(*c*) *Grant v. Norway, supra*; *Cox v. Bruce*, 1886, 18 Q. B. D. 147; 56 L. J. Q. B. 121, C. A. Comp. *British Columbia, &c. Co. v. Nettleship*, 1868, L. R. 3 C. P. 499; 37 L. J. C. P. 235.

(*d*) *Hubbersty v. Ward*, 1853, 8 Ex. 330; 22 L. J. Ex. 113; 91 R. R. 519; *Thorman v. Burt*, 1886, 54 L. T. 349, C. A.

lading, by indorsement or otherwise, are deemed to have notice that his authority is so limited (*d*). The 3rd section of the 18 & 19 Vict. c. 111—providing that every bill of lading, in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment against the master or other person signing the same, notwithstanding such goods or part thereof may not have been shipped, &c.—applies only as against the persons who have actually signed the bill of lading (*e*), and does not make the master's signature conclusive evidence against the owners (*f*). The master's signature is *primâ facie* evidence against the owners that the goods were put on board (*g*); but they are permitted to prove that in fact they were not (*f*), unless there is an agreement that the bill of lading shall be conclusive against the owners as to the quantity shipped (*h*).

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(*d*) See previous note.

(*e*) *Jessel v. Bath*, 1867, L. R. 2 Ex. 267; 36 L. J. Ex. 149.

(*f*) *Meyer v. Dresser*, 1864, 33 L. J. C. P. 289; 16 C. B. N. S. 646; *Brown v. Powell Duffryn Coal Co.*, 1875, L. R. 10 C. P. 562; 44 L. J. C. P. 289.

(*g*) *M'Lean v. Fleming*, 1871, 2 H. L. Sc. App. 128, H. L.; *Smith v. Bedouin S. N. Co.*, (1896) A. C. 70; 65 L. J. P. C. 8, H. L. Sc.; *Bennett v. Bacon*, 1897, 13 T. L. R. 204.

(*h*) *Lishman v. Christie*, 1887, 19 Q. B. D. 333; 56 L. J. Q. B. 538, C. A.; *Crossfield v. Kyle Shipping Co.*, (1916) 2 K. B. 885; 85 L. J. K. B. 1310, C. A.

## CHAPTER VII.

## DELEGATION OF AGENCY.

## Article 40.

## WHEN AGENT MAY DELEGATE HIS AUTHORITY.

No agent has power to delegate his authority, or to appoint a sub-agent to do any act on behalf of the principal, except with the express or implied authority of the principal. The authority of the principal is implied in the following cases:—

- (1) Where the employment of a sub-agent is justified by the usage of the particular trade or business in which the agent is employed, provided that such usage is not unreasonable, nor inconsistent with the express terms of the agent's authority or instructions (*a*).
- (2) Where the principal knows, at the time of the agent's appointment, that the agent intends to delegate his authority (*b*).
- (3) Where, from the conduct of the principal and agent, it may reasonably be presumed

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(*a*) *De Bussche v. Alt*, 1877, 8 Ch. D. 286; 47 L. J. Ch. 381, C. A.; Illustration 6.

(*b*) *Quebec, &c. Rail. Co. v. Quinn*, 1858, 12 Moo. P. C. C. 232, P. C.; *Dew v. Met. Rail. Co.* 1885, 1 T. L. R. 358; Illustration 6.

to have been their intention that the agent should have power to delegate his authority (*c*).

- (4) Where, in the course of the agent's employment, unforeseen emergencies arise which render it necessary for the agent to delegate his authority (*c*).
- (5) Where the authority conferred is of such a nature as to necessitate its execution wholly or in part by means of a deputy or sub-agent (*d*).
- (6) Where the act done is purely ministerial, and does not involve confidence or discretion (*e*).

The maxim "*Delegatus non potest delegare*" is founded on the confidential character of the contract of agency, and whenever authority is coupled with a discretion or confidence, it must, as a general rule, be executed by the agent in person (*f*). Thus, auctioneers (*g*), factors (*h*), directors (*i*),

(*c*) *De Bussche v. Al'*, 1877, 8 Ch. D. 286; 47 L. J. Ch. 381, C. A.; *Gwilliam v. Twist*, (1895) 2 Q. B. 84; 64 L. J. Q. B. 474, C. A.; *Harris v. Fiat Motors*, 1906, 22 T. L. R. 556.

(*d*) See note (*b*), p. 109.

(*e*) Illustrations 4 and 5; *Mason v. Joseph*, 1804, 1 Smith, 406; *Rossiter v. Trafalgar Life Ass. Co.*, 1859, 27 Beav. 377; *St. Margaret's Burial Board v. Thompson*, 1871, L. R. 6 C. P. 445; 40 L. J. C. P. 213; *Hemming v. Hale*, 1859, 29 L. J. C. P. 137; 7 C. B. N. S. 487.

(*f*) *Combe's case*, 9 Co. R. 75 (vol. 5, p. 135); *Blore v. Sutton*, 1816, 3 Meriv. 237; 17 R. R. 74; *Symonds v. Kurtz*, 1889, 61 L. T. 559.

(*g*) *Coles v. Trecothick*, 1804, 9 Ves. 234; 7 R. R. 167.

(*h*) *Cockran v. Irlam*, 1813, 2 M. & S. 301; 15 R. R. 257; *Catlin v. Bell*, 1815, 4 Camp. 183; *Solly v. R. Athbone*, 1814, 2 M. & S. 298.

(*i*) *Re Leeds Banking Co., Howard's case*, 1866, L. R. 1 Ch. 561; 36 L. J. Ch. 42.

liquidators (*k*), brokers (*l*), &c., have, in general, no implied authority to employ deputies or sub-agents.

### *Illustrations.*

1. A shipmaster was authorized to sell certain goods. Held, that he had no implied authority to send them on to another person for sale, though he was unable himself to find a purchaser (*m*).

2. A board constituted by statute was authorized to delegate its powers to a committee. Held, that the committee must exercise in concert the powers delegated to them, and could not apportion them amongst themselves (*n*).

3. The directors of a company were given power to purchase the company's own shares, and also to appoint a general manager. Held, that the power to purchase shares could not be delegated by the directors to the general manager (*o*). Directors of companies governed by the 8 & 9 Vict. c. 16, or by the provisions of Table A. of the Companies (Consolidation) Act, 1908, may, however, delegate their authority to committees consisting of one or more of themselves.

4. An agent buys property at a sale by auction, and the auctioneer enters his name as buyer without objection by the principal, who is present at the sale. The entry is a sufficient memorandum of the contract to satisfy the Statute of Frauds as against the principal (*p*). But where a tenant for life had a power to lease, and a memorandum of a contract for a lease was signed by his agent's clerk with the approval of the agent and in the ordinary course of business, it was held that

(*k*) *Ex p. Birmingham Banking Co.*, 1868, L. R. 3 Ch. 651.

(*l*) *Henderson v. Barnewell*, 1827, 1 Y. & J. 387; 30 R. R. 799; *Cochran v. Irlam*, 1813, 2 M. & S. 301; 15 R. R. 257.

(*m*) *Catlin v. Bell*, 1815, 4 Camp. 183.

(*n*) *Cook v. Ward*, 1877, 2 C. P. D. 255, C. A.

(*o*) *Cartmell's case*, 1874, L. R. 9 Ch. 691; 43 L. J. Ch. 588.

(*p*) *White v. Proctor*, 1811, 4 Taunt. 209; 13 R. R. 580; *Coles v. Trecothick*, 1804, 9 Ves. 234; 7 R. R. 167.

the memorandum was not sufficient to satisfy the Statute of Frauds, not having been signed by a duly authorized agent within the meaning of that statute (*q*).

5. An agent has authority to draw bills of exchange in the principal's name. The authority may be exercised through the agent's clerk (*r*). So, an authority given to an agent to indorse a particular bill in the principal's name may be delegated, because such acts are purely ministerial and involve no discretion (*r*). So, it was held that though four liquidators had no power to authorize one of their number to accept bills of exchange on behalf of them all, they might authorize him to accept a particular bill on their behalf, because the execution of the former authority would involve discretion, whereas the latter was an authority to do a purely ministerial act (*s*).

6. *Solicitors' town agents*.—A country solicitor has implied authority to act through his London agent when necessary or usual in the ordinary course of business, and the acts of such agent in reference to the matters intrusted to him bind the client (*t*). If a London agent has the general conduct of an action, he has the same general authority in conducting it, including authority to compromise, as the country solicitor employing him, in the absence of any express limits on such general authority (*u*). But a solicitor

(*q*) *Blore v. Sutton*, 1816, 3 Meriv. 237; 17 R. R. 74. And see *Doe d. Rhodes v. Robinson*, 1837, 6 L. J. C. P. 235; 3 Bing. N. C. 677; 43 R. R. 758.

(*r*) *Ex p. Sutton*, 1788, 2 Cox, 84; *Lord v. Hall*, 1848, 2 C. & K. 698. See also *Kenworthy v. Schofield*, 1824, 2 B. & C. 945; 26 R. R. 600; *White v. Proctor*, 1811, 4 Taunt. 209; 13 R. R. 580; *Brown v. Tombs*, (1891) 1 Q. B. 253; 60 L. J. Q. B. 38.

(*s*) *Ex p. Birmingham Banking Co.*, 1868, L. R. 3 Ch. 651.

(*t*) *Griffiths v. Williams*, 1787, 1 T. R. 710; *Wearry v. Alderson*, 1837, 2 M. & Rob. 127; *Solley v. Wood*, 1852, 16 Beav. 370. See Article 41, Illustrations 8 and 9.

(*u*) *Re Newen*, (1903) 1 Ch. 812; 72 L. J. Ch. 356.



cannot delegate his entire employment to his London agent so as to make the agent his client's solicitor (*x*).

### Article 41.

#### RELATIONS BETWEEN PRINCIPAL AND SUB-AGENT.

There is no privity of contract between a principal and sub-agent, as such, whether the sub-agent was appointed with the authority of the principal or not; and the rights and duties arising out of the contracts between the principal and agent, and between the agent and sub-agent, respectively, are only enforceable by and against the immediate parties thereto (*y*). Provided, that the relation of principal and agent may be established by an agent between his principal and a third person, if the agent is expressly or impliedly authorized to constitute such relation, and it is the intention of the agent and of such third person that such relation should be constituted (*z*).

Where a sub-agent is appointed without the authority, express or implied, of the principal, the principal is not bound by his acts (*a*).

(*x*) *Wray v. Kemp*, 1883, 26 Ch. Div. 169; 53 L. J. Ch. 1020. See also *In re Beckett*, (1918) 2 Ch. 72; 87 L. J. Ch. 457.

(*y*) *New Zealand and Australian Land Co. v. Watson*, 1881, 7 Q. B. D. 374; 50 L. J. Q. B. 433, C. A.; *Robbins v. Fennell*, 1847, 11 Q. B. 248; 17 L. J. Q. B. 77; 75 R. R. 363; *Schmaling v. Tomlinson*, 1815, 6 Taunt. 147; *Scott v. Crawford*, 1842, 4 M. & G. 1031; 61 R. R. 750; *Hannaford v. Syms*, 1898, 79 L. T. 30; Illustrations 2 to 9.

(*z*) Illustration 1.

(*a*) See *Doe d. Rhodes v. Robinson*, 1837, 3 Bing. N. C. 677; 43 R. R. 758; *Blore v. Sutton*, 1816, 3 Meriv. 237; 17 R. R. 74; *Wray v. Kemp*, 1883, 26 Ch. D. 169; 53 L. J. Ch. 1020. Illustrations 6 and 7.

*Illustrations.*

1. A ship was consigned to A., an agent in China, for sale, a minimum price being fixed. A., with the knowledge and consent of the principal, employed B. to sell the ship. B., being unable to find a purchaser, bought the ship himself at the minimum price, and subsequently resold her at a large profit. It was held that privity of contract existed between the principal and B., and that B. was liable to account to the principal for the profit made on the re-sale (b).

2. A factor was employed to sell goods on a *del credere* commission. The factor, with the principal's authority, employed a broker on an ordinary commission to sell the goods. The broker sold the goods and received the proceeds, and made payments on account to the factor from time to time. While the balance of the proceeds was still in the hands of the broker, the factor, being then indebted to the broker in respect of other independent transactions, became bankrupt. Held—(1) that there was no privity of contract between the principal and the broker; (2) that the broker was not liable to account to the principal for the proceeds of the goods sold; (3) that the principal was not entitled to recover the balance of the proceeds from the broker in the factor's name without allowing the amount due from the factor to the broker in respect of other transactions to be set off, though the broker had reason to believe that the factor was acting as an agent (c).

3. An agent appointed a sub-agent to manage the principal's affairs. The sub-agent took over the entire management thereof, and communicated with the principal direct. Held, that the sub-agent was not liable to render an account

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(b) *De Bussche v. Alt*, 1877, 8 Ch. D. 286; 47 L. J. Ch. 381, C. A.; *Powell v. Jones*, (1905) 1 K. B. 11; 74 L. J. K. B. 115, C. A.

(c) *New Zealand and Australian Land Co. v. Watson*, 1881, 7 Q. B. D. 374; 50 L. J. Q. B. 433, C. A. See, however, *Blackburn v. Mason*, 1893, 68 L. T. 510

of his agency to the principal (*d*). The rule is that sub-agents must account to the agents employing them, and the agents to their principals (*e*). An agent is only liable to account to his own principal (*f*).

4. A. employs B. to transport goods to a foreign market. B., without A.'s knowledge or consent, delegates his entire employment to C. There is no privity of contract between A. and C., and A. is not liable to C. for his charges, even if he has not paid B. for the services rendered (*g*).

5. A. employs B. to procure a loan on usual terms. B. employs C., who obtains a loan on terms which are unusual. A. is not liable to C. for commission, unless he ratifies the terms of the loan and recognizes C. as his agent (*h*).

6. A factor delegates his employment without the authority of the principal. The sub-agent has no lien for duties, &c. paid by him, as against the principal (*i*).

7. A. authorizes B., a shipbroker, to receive payment of freight. B. cannot delegate the authority, and if he professes to do so, A. is not bound by the payment of the freight to the sub-agent (*k*).

#### *Solicitors' town agents.*

8. The London agent of a country solicitor, in the ordinary course receives, as such, the proceeds of a cause in which he is engaged. There is no privity of contract between the client

(*d*) *Lockwood v. Abdy*, 1845, 14 Sim. 437; 65 R. R. 621. And see *Curtwright v. Hateley*, 1791, 1 Ves. jun. 292.

(*e*) *Stephens v. Badrock*, 1832, 1 L. J. K. B. 75; 3 B. & Ad. 354; 37 R. R. 448; *Sims v. Brittain*, 1832, 1 N. & M. 594; *Montagu v. Forwood*, (1893) 2 Q. B. 350, C. A.

(*f*) *Att.-Gen. v. Chesterfield*, 1854, 18 Beav. 596; 104 R. R. 542; *Pinto v. Santos*, 1814, 1 Marsh. 132; *Maw v. Pearson*, 1860, 28 Beav. 196.

(*g*) *Schmaling v. Tomlinson*, 1815, 6 Taunt. 147.

(*h*) *Mason v. Clifton*, 1863, 3 F. & F. 899.

(*i*) *Solly v. Rathbone*, 1814, 2 M. & S. 298.

(*k*) *Dunlop v. De Murrieta*, 1886, 3 T. L. R. 166, C. A.

and the London agent, and the client cannot recover the proceeds from him as money received to the client's use (*l*). So, a London agent, in the ordinary course, gives credit to the country solicitor and not to the client, and has no remedy, except his lien, against the client for costs, and such lien, as against the client, is limited to the amount due from the client to the country solicitor (*m*). The Court may, however, in exercise of its summary jurisdiction over its own officers, order a London agent to pay over to the client money received, the agent claiming to retain the amount in satisfaction of a debt due to him from the country solicitor (*n*), or having received it without the authority of either the country solicitor or the client (*o*).

9. A client gives money to his solicitor to pay a debt and costs. The solicitor remits the amount, by means of his own cheque, to his London agent for the purpose of paying such debt and costs. The agent retains the amount in satisfaction of a debt due to him from the solicitor. The agent is not liable to the client in an action for money had and received to the client's use (*p*). So, if a London agent receives money improperly, the remedy of the client is against his own solicitor, not against the agent (*q*).

(*l*) *Robbins v. Fennell*, 1847, 11 Q. B. 248; 17 L. J. Q. B. 77; 75 R. R. 363. And see *Hannaford v. Syms*, 1898, 79 L. T. 30.

(*m*) *Ex p. Edwards, Re Johnson*, 1881, 7 Q. B. D. 155; 8 Q. B. D. 262; 51 L. J. Q. B. 108, C. A.; *Waller v. Holmes*, 1860, 30 L. J. Ch. 24; 1 Johns. & H. 239; *Farewell v. Coker*, 1728, 2 P. W. 460.

(*n*) *Ex p. Edwards, supra*; *Hanley v. Cassan*, 1847, 11 Jur. 1088; 81 R. R. 932.

(*o*) *Robbins v. Fennell*, 1847, 11 Q. B. 248; 17 L. J. Q. B. 77; 75 R. R. 363; *Robbins v. Heath*, 1848, 11 Q. B. 257, n.; 75 R. R. 363, n.

(*p*) *Cobb v. Becke*, 1845, 6 Q. B. 930; 14 L. J. Q. B. 108; 66 R. R. 606. See, however, *Ex p. Edwards, supra*.

(*q*) *Gray v. Kirby*, 1834, 2 Dowl. 601. See, however, *Robbins v. Fennell, supra*; *Robbins v. Heath, supra*.

CHAPTER VIII.  
DUTIES OF AGENTS.

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Article 42.

DUTY TO PERFORM HIS UNDERTAKING.

EVERY agent who enters into an undertaking for valuable consideration is bound to perform the undertaking (*a*); but no agent is liable for the mere non-performance of that which he has undertaken to do gratuitously (*b*). Every agent must act in person, unless he is expressly or impliedly authorized by the principal to delegate his duties (*c*).

Article 43.

DUTY TO OBEY INSTRUCTIONS, OR ACT ACCORDING TO  
USAGE AND FOR THE PRINCIPAL'S BENEFIT.

It is the duty of every agent to strictly pursue the terms of his authority and obey the lawful

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(*a*) *Turpin v. Bilton*, 1843, 12 L. J. C. P. 167; 5 M. & G. 455.

(*b*) *Coggs v. Bernard*, 2 Ld. Raym. 909; *Balfe v. West*, 1853, 22 L. J. C. P. 175; 13 C. B. 466; 93 R. R. 620; *Elsee v. Gatward*, 1793, 5 T. R. 143.

(*c*) See Article 40.

instructions of his principal (*d*); and, in the absence of express instructions, to act according to any lawful and reasonable usage applicable to the matter in hand (*e*), or where there is no special usage, and in all matters left to his discretion, to act in good faith to the best of his judgment solely for the benefit of the principal (*f*).

### *Illustrations.*

1. An agent is instructed to sell certain shares when the funds reach 85 or more. He is bound to sell when the funds reach 85, and has no discretion to wait until they go higher (*g*).

2. A. by letter requests B. to purchase 150 bales of cotton and forward a bill of lading, in exchange for which A. undertakes to accept B.'s draft. B. accepts the commission. B. is bound to forward the bill of lading as soon as possible, and is not entitled to retain it until A. gives security for payment. If he does so retain it, A. is justified in refusing to accept the cotton (*h*).

(*d*) Illustrations 1 to 5. *Smart v. Sandars*, 1846, 3 C. B. 380; 15 L. J. C. P. 39; 71 R. R. 384; *Pariete v. Lubbock*, 1855, 20 Beav. 588; 114 R. R. 1; *Bertram v. Godfray*, 1830, 1 Knapp. 381, P. C.; *Ex p. Mather*, 1797, 3 Ves. 372.

(*e*) Illustrations 6 to 10. *Solomon v. Barker*, 1862, 2 F. & F. 726; *Moore v. Mourgue*, 1776, Cowp. 479; *Hurrell v. Bullard*, 1862, 3 F. & F. 445; *Re Overueg*, *Haas v. Durant*, (1900) 1 Ch. 209; 69 L. J. Ch. 255.

(*f*) *Gray v. Haig*, 1854, 20 Beav. 219; 109 R. R. 396; *General Exchange Bank v. Horner*, 1869, L. R. 9 Eq. 480; 39 L. J. Ch. 393; *East India Co. v. Henchman*, 1791, 1 Ves. jun. 289; *Gwatkin v. Campbell*, 1854, 1 Jur. N. S. 131; *Pariete v. Lubbock*, 1855, 20 Beav. 588; *Comber v. Anderson*, 1808, 1 Camp. 523; *Dyas v. Cruise*, 1845, 8 Ir. Eq. R. 407; 69 R. R. 348, Ir.

(*g*) *Bertram v. Godfray*, 1870, 1 Knapp, 381, P. C.

(*h*) *Barber v. Taylor*, 1839, 5 M. & W. 527; 9 L. J. Ex. 21; 52 R. R. 814.

3. A foreign merchant sends a bill of lading to his correspondent in England with instructions to insure the goods. If the correspondent accepts the bill of lading he is bound to insure (*i*).

4. A solicitor, retained to conduct an action, is expressly instructed by the client not to enter into any compromise. It is his duty to obey his client's instructions, even if the counsel engaged in the case advise a compromise (*k*).

5. An auctioneer, at a sale without reserve, is instructed by the vendor not to sell for less than a certain sum. Such instructions are unlawful, and it is the duty of the auctioneer to accept the highest *bonâ fide* bid, even if it be for less than the sum mentioned (*l*).

6. A stockbroker is instructed to sell certain shares. It is his duty to sell for ready money, according to usage, in the absence of special directions to the contrary (*m*).

7. A stockbroker sells shares on behalf of a client. The shares are in the possession of the client's banker. The broker is under no obligation to pay to the banker the price at which the shares were sold against delivery of the shares, or to ask the jobber who bought them to pay the banker direct for them. He is only bound to carry the contract through according to the rules of the Stock Exchange, and the ordinary course of business (*n*).

8. It is the duty of an auctioneer, in the absence of special instructions, to sell for ready money only (*o*), but he may

(*i*) *Smith v. Lascelles*, 1788, 2 T. R. 187; 1 R. R. 457; *Corlett v. Gordon*, 1813, 3 Camp. 472; 14 R. R. 813.

(*k*) *Fray v. Voules*, 1859, 28 L. J. Q. B. 232; 1 El. & El. 839; 117 R. R. 483. And see *Swinfen v. Swinfen*, 1858, 2 De G. & J. 381; 119 R. R. 160; and *Neale v. Gordon-Lennox*, (1902) A. C. 465, H. L., as to the duty of counsel to act according to his client's wishes.

(*l*) *Bexwell v. Christie*, 1776, Cowp. 395.

(*m*) *Wiltshire v. Sims*, 1808, 1 Camp. 258; 10 R. R. 673.

(*n*) *Hawkins v. Pearse*, 1903, 9 Com. Cas. 87.

(*o*) *Ferrers v. Robins*, 1835, 2 C. M. & R. 152; *Williams v. Evans*, 1866, L. R. 1 Q. B. 352; 35 L. J. Q. B. 111.

take a cheque in lieu of cash in payment of the deposit, according to the usual custom (*p*). An agent ought not, however, to accept a cheque in lieu of cash which he has been authorized to receive, unless it is customary to do so in the particular business in which he is employed (*q*).

9. Goods are intrusted to a broker for sale. It is usual in the particular trade to send an estimate of the value to the principal, in order that he may fix a reserve price. It is the broker's duty to send such an estimate to his principal (*r*).

10. It is the duty of a house or estate agent, where he is instructed to find a purchaser for property at a minimum price, to submit any offers which may be made to him to his principal, and not to enter into a contract for the sale of the property unless the principal has expressly authorized him to do so (*s*).

*Execution of deeds under powers of attorney.*—It was formerly necessary, in order to render a deed executed under a power of attorney binding on the principal, or to entitle him to sue thereon, that the deed should be executed in his name (*t*). But the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 46, provides that the donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing, in and with his own name and signature, and his own seal, where sealing is required, by the authority of

(*p*) *Farrer v. Lacy*, 1885, 31 Ch. Div. 42; 55 L. J. Ch. 149, C. A.

(*q*) *Papè v. Westacott*, (1894) 1 Q. B. 272; 63 L. J. Q. B. 222, C. A., where a house agent accepted a cheque and was held liable for breach of duty.

(*r*) *Solomon v. Barker*, 1862, 2 F. & F. 726.

(*s*) *Chadburn v. Moore*, 1892, 61 L. J. Ch. 674; *Hamer v. Sharp*, 1874, L. R. 19 Eq. 108; 44 L. J. Ch. 53. Comp. *Rosenbaum v. Belson*, (1900) 2 Ch. 267; 69 L. J. Ch. 569.

(*t*) See *White v. Cuyler*, 1795, 6 T. R. 176; 3 R. R. 147; *Wilks v. Back*, 1802, 2 East, 142; 6 R. R. 409; *Berkeley v. Hardy*, 1826, 5 B. & C. 355; 29 R. R. 261; *Frontin v. Small*, 1726, 2 Ld. Raym. 1419; *Combe's case*, 9 Co. R. 75.



the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

#### Article 44.

#### DUTY TO KEEP PRINCIPAL'S PROPERTY SEPARATE, AND TO PRESERVE CORRECT ACCOUNTS.

It is the duty of every agent—

- (a) to keep the money and property of his principal separate from his own and from that of other persons (*u*);
- (b) to preserve and be constantly ready with correct accounts of all his dealings and transactions in the course of his agency (*x*);
- (c) to produce to the principal, or to a proper person appointed by the principal, all books and documents in his hands relating to the principal's affairs (*y*); and

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(*u*) *Gray v. Haig*, 1854, 20 Beav. 219; 109 R. R. 396; *Clarke v. Tipping*, 1846, 9 Beav. 284; 73 R. R. 355; *Guerreiro v. Peile*, 1820, 3 B. & A. 616; 22 R. R. 500.

(*x*) *Gray v. Haig*, *supra*; *Clarke v. Tipping*, *supra*; *Pearse v. Green*, 1819, 1 Jac. & W. 135; 20 R. R. 258; *Turner v. Burkinshaw*, 1867, L. R. 2 Ch. 488; *Collyer v. Dudley*, 1823, T. & R. 421. *Comp. Re Lee*, *Ex p. Neville*, 1868, L. R. 4 Ch. 43.

(*y*) *Dadswell v. Jacobs*, 1887, 34 Ch. Div. 278; 56 L. J. Ch. 233, C. A. (The principal cannot call upon him to produce documents, &c. to an improper person, such as a rival or unfriendly person. *Ibid.*) As to the right to possession of books, &c. on the bankruptcy of the agent, see *Re Burnand*, *Ex p. Wilson*, (1904) 2 K. B. 68; 73 L. J.

(d) to pay over to the principal, on request, money received in the course of the agency to the use of the principal (z).

Where an agent is permitted to retain for investment money belonging to his principal, he is in the position of, and is under the same duties and liabilities as, a trustee (a).

Where an agent fails to keep and preserve correct accounts, and is called upon for an account of his agency, everything will be presumed against him that is consistent with established facts (b). So, if he mixes the property of the principal with his own, everything not proved to be his own will be deemed to be the principal's (c).

Where an agent pays his principal's money into his own banking account, he is responsible for the amount, in the event of the failure of the banker, even if acting gratuitously (d).

An agent who improperly refuses to pay over money on request is chargeable with interest from the date of the request (e).

K. B. 413, C. A., and on the bankruptcy of the principal, *In re Ellis*, (1908) W. N. 215; 25 T. L. R. 38.

(z) *Harsant v. Blaine*, 1887, 56 L. J. Q. B. 511, C. A.; *Pearse v. Green*, 1819, 1 Jac. & W. 135; 20 R. R. 258; *Edgell v. Day*, 1865, L. R. 1 C. P. 80; 35 L. J. C. P. 7.

(a) *Burdick v. Garrick*, 1870, L. R. 5 Ch. 233; 39 L. J. Ch. 369; *Power v. Power*, 1884, L. R. 13 Ir. 281.

(b) *Gray v. Haig*, 1854, 20 Beav. 219; 109 R. R. 396; *Jenkins v. Gould*, 1827, 3 Russ. 385.

(c) *Lupton v. White*, 1808, 15 Ves. 432; 10 R. R. 94.

(d) *Massey v. Banner*, 1820, 1 Jac. & W. 241; 21 R. R. 150.

(e) *Harsant v. Blaine*, 1887, 56 L. J. Q. B. 511, C. A.

## Article 45.

DUTY TO EXERCISE DUE SKILL, CARE AND DILIGENCE (*f*).

Every agent acting for reward is bound to exercise such skill, care, and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the profession or business in which he is employed, or is reasonably necessary for the proper performance of the duties undertaken by him (*g*).

Every agent acting gratuitously is bound to exercise such skill as he actually possesses, and such care and diligence as he would exercise in his own affairs (*h*); and if he has held himself out to the principal as possessing skill adequate to the performance of the particular undertaking, then such care and skill as is reasonably necessary for the performance thereof (*i*).

Every agent is bound to exercise reasonable care and diligence in looking after and protecting the monies and property of his principal in his possession or custody, or under his control (*k*).

(*f*) See also Article 56, and illustrations thereto.

(*g*) *Beal v. South Devon Rail. Co.*, 1864, 3 H. & C. 337, Ex. Ch.; *Solomon v. Barker*, 1862, 2 F. & F. 726; *Harmer v. Cornelius*, 1858, 5 C. B. N. S. 236; 116 R. R. 654. And see Illustrations 1 to 10, in all of which the agent was acting for reward.

(*h*) *Moffatt v. Bateman*, 1869, L. R. 3 P. C. 115, P. C.; *Wilson v. Brett*, 1843, 12 L. J. Ex. 264; 63 R. R. 528. Illustrations 11 to 13. See also Article 56, Illustration 21.

(*i*) *Beal v. South Devon Rail. Co.*, 1864, 3 H. & C. 337, Ex. Ch. Illustration 13. See also Article 56, Illustration 21.

(*k*) *Massey v. Banner*, 1820, 1 Jac. & W. 241; 21 R. R. 150; *Maltby*

What is the usual or necessary, or a reasonable, degree of skill, care, or diligence, is a question of fact depending upon the nature of the agency, and the circumstances of the particular case.

*Illustrations.*

1. A house agent is employed to let houses, and is paid a commission of 5 per cent. He is bound to use reasonable care to ascertain the solvency of the tenants (*l*).

2. An insurance broker undertakes to effect an insurance. He is bound to use due diligence to perform what he has undertaken within a reasonable time (*m*), and if he is unable to effect the insurance according to the instructions, to give notice to his principal of that fact (*n*).

3. An agent is employed to purchase a public-house. It is his duty to examine the takings, &c., and the fact that the principal has himself examined them on the advice of the agent does not exonerate him from liability for a breach of that duty (*o*).

4. An insurance broker is employed to insure from a particular point. It is his duty to insert in the policy all the clauses usually inserted in an insurance from that point (*p*).

5. A broker is employed on commission to purchase and ship scrap iron. He is not bound to inspect the iron for the purpose of ascertaining whether it is of the quality bought,

v. *Christie*, 1795, 1 Esp. 340; *Reeve v. Palmer*, 1859, 28 L. J. C. P. 168; 5 C. B. N. S. 84; 116 R. R. 573. Illustrations 11 to 13.

(*l*) *Hayes* (or *Heys*) v. *Tindall*, 1861, 30 L. J. Q. B. 362; 1 B. & S. 296.

(*m*) *Turpin v. Bilton*, 1843, 5 M. & G. 455; 12 L. J. C. P. 167.

(*n*) *Callander v. Oelricks*, 1839, 8 L. J. C. P. 25; 5 Bing. N. C. 58; 50 R. R. 602.

(*o*) *Smith v. Barton*, 1866, 15 L. T. 294.

(*p*) *Mallough v. Barber*, 1815, 4 Camp. 150.

because it is not part of a broker's ordinary business to inspect goods bought by him as such (*q*).

6. A share broker is employed to buy certain railway scrip. He buys on the market, in the ordinary course of business, what is usually sold as such scrip. He is not responsible to the principal because the scrip turns out not to be genuine, having had no notice that it was not genuine, and having bought it in the ordinary course of business (*r*).

7. An insurance broker retains in his own hands a policy effected by him. He is bound to use due diligence to procure a settlement and payment of a loss arising thereunder (*s*).

8. A. acts as a patent agent. He is bound to know the law relating to the practice of obtaining patents, and is responsible to his principal for injury caused through his ignorance of such law. Every person who acts as a skilled agent is bound to bring reasonable skill and knowledge to the performance of his duties (*t*).

9. A. acts as a valuer of ecclesiastical property. He is bound to know the general rules applicable to the valuation of dilapidations, but is not expected to have an accurate and precise knowledge of the law relating thereto (*u*).

10. A broker was employed to sell certain goods "to arrive," of "fair average quality in the opinion of the selling broker." A dispute having arisen, the broker inspected the goods and reported that they were not of fair average quality. Held, that he was not bound to exercise any skill

(*q*) *Zwilchenbart v. Alexander*, 1860, 30 L. J. Q. B. 254; 1 B. & S. 234, Ex. Ch.

(*r*) *Lambert v. Heath*, 1846, 15 M. & W. 486; 71 R. R. 738; *Mitchell v. Newhall*, 1846, 15 L. J. Ex. 292; 15 M. & W. 308.

(*s*) *Bousfield v. Cresswell*, 1810, 2 Camp. 545; 11 R. R. 794.

(*t*) *Lee v. Walker*, 1872, L. R. 7 C. P. 121; 41 L. J. C. P. 91; *Lamphier v. Phipos*, 1838, 8 C. & P. 475; *Parker v. Rolls*, 1854, 14 C. B. 691; 98 R. R. 822.

(*u*) *Jenkins v. Betham*, 1855, 24 L. J. C. P. 94; 15 C. B. 168; 100 R. R. 297.

in order to form a correct opinion, it not being part of the ordinary business of a broker to act as an arbitrator (*x*).

11. A. rides a horse gratuitously for the purpose of exhibiting it. He is bound to exercise such skill as he actually possesses, and is responsible to his principal for any injury caused by his neglect to do so. Whether he in fact exercised such skill or not is a question for the jury (*y*).

12. A general merchant undertakes, without reward, to enter a parcel of A.'s goods with a parcel of his own. He enters both parcels, by mistake, under a wrong denomination, and the goods are seized. He is not responsible to A. for the loss, having taken the same care of A.'s goods as of his own (*z*).

13. A. offers, without reward, to lay out 700*l.* in the purchase of an annuity, and undertakes to obtain good security. He is bound to use reasonable care to lay out the money securely (*a*).

#### Article 46.

##### DUTY TO PAY OVER MONEY RECEIVED TO USE OF PRINCIPAL.

Subject to the provisions of Article 77, every agent who receives money to the use of his principal is bound to pay over or account for such money to the principal, notwithstanding claims made by third persons in respect thereof (*b*), even

(*x*) *Pappa v. Rose*, 1872, L. R. 7 C. P. 32, 525; 41 L. J. C. P. 11, 187, Ex. Ch.

(*y*) *Wilson v. Brett*, 1843, 11 M. & W. 113; 12 L. J. Ex. 264; 63 R. R. 528.

(*z*) *Shiells v. Blackburne*, 1789, 1 H. Bl. 159; 2 R. R. 750. And see *Bullen v. Swan Electric Engraving Co.*, 1907, 23 T. L. R. 257, C. A.

(*a*) *Whitehead v. Greeham*, 1825, 2 Bing. 464, Ex. Ch.

(*b*) *Nickolson v. Knowles*, 1820, 5 Madd. 47; 21 R. R. 276; Illustrations

if the money was received in respect of a void (*c*) or illegal (*d*) transaction. Provided that, where money is obtained by an agent wrongfully, or is paid to him under a mistake of fact or for a consideration which fails, he may show that he has repaid it to the person from whom he so obtained it or who so paid it to him (*e*); and where money is paid to him in respect of a voidable contract, he may show that the contract has been rescinded, and the money repaid, even if the contract was rescinded solely on the ground of his own fraud (*f*). Provided also, that no principal can enforce an unlawful transaction between himself and his agent (*g*).

An agent who receives money to the use of two or more principals jointly is bound to account to them jointly, and is not bound to pay over to one or more of them the whole or any part of such money without the consent of the other or others, whatever may be the rights of the principals in respect of such money as between themselves (*h*).

Every agent, in accounting for money received

tions 1 and 2. See also *Eames v. Hacon*, 1881, 18 Ch. D. 347; 50 L. J. Ch. 740, C. A.

(*c*) Illustration 5.

(*d*) Illustration 4.

(*e*) See Article 125.

(*f*) Illustration 6.

(*g*) Illustration 4.

(*h*) *Hatsall v. Griffith*, 1834, 2 C. & M. 679; *Heath v. Chilton*, 1844, 12 M. & W. 632; 13 L. J. Ex. 225; 67 R. R. 447. See also *Lee v. Sankey*, 1872, L. R. 15 Eq. 204; *Innes v. Stephenson*, 1831, 1 M. & Rob. 145; *Jones v. Cuthbertson*, 1873, L. R. 8 Q. B. 504; 42 L. J. Q. B. 221, Ex. Ch.

to the use of his principal, is entitled to take credit for all just allowances (*i*), and for any sums expended by him with the authority of the principal, even if they were expended for an unlawful purpose (*k*); but authority to deal with money in an unlawful manner may be revoked at any time before the money has been actually paid away (*l*).

### *Illustrations.*

1. A ship which is the property of A. is transferred to B. as security for a debt. B. insures the ship for and on behalf of A. & Company, and charges them with the premiums. The ship is lost, and B. receives the insurance money. B. must pay over the money, after deducting the amount of his debt, to A. & Company, and cannot set up A.'s title, having insured for and on behalf of A. & Company (*m*). So, an insurance broker who receives money under a policy cannot dispute the claim of his principal on the ground that other persons are interested in the subject-matter of the insurance, their claims being a matter between them and the assured, with which the broker has nothing to do (*n*).

2. Money is paid to an agent on account of his principal, by a person who is indebted to the agent also. He must pay over the money to the principal, and is not entitled to appropriate it to his own debt (*o*).

(*i*) *Dale v. Sollet*, 1767, 4 Burr. 2133.

(*k*) *Bayntun v. Cattle*, 1833, 1 M. & Rob. 265.

(*l*) *Bone v. Ekless*, 1860, 29 L. J. Ex. 438; 5 H. & N. 925; 120 R. R. 896; *Taylor v. Bowers*, 1876, 1 Q. B. D. 291; 45 L. J. Q. B. 163, C. A.

(*m*) *Dixon v. Hamond*, 1819, 2 B. & A. 310.

(*n*) *Roberts v. Ogilby*, 1821, 9 Price, 269; 23 R. R. 671.

(*o*) *Heath v. Chilton*, 1844, 12 M. & W. 632; 13 L. J. Ex. 225; 67 R. R. 447; *Shaw v. Picton*, 1825, 4 B. & C. 715; 28 R. R. 455.



3. A. deposits bank notes with his banker, who sends them to the issuing bank and receives credit for the amount. That is equivalent to actual payment, and A.'s banker must account to A. for the amount, though he never actually received payment of the notes, in consequence of the failure of the issuing bank (*p*).

4. An agent receives money on his principal's behalf under an illegal contract. The agent must account to the principal for the money, and cannot set up the illegality of the contract, which the other contracting party has waived by paying the money (*q*). Otherwise, if the contract of agency had been unlawful (*r*).

5. A turf commission agent is employed to make bets. He must pay over to the principal the amount of any winnings actually received by him in respect of such bets, though the bets themselves are void by statute (8 & 9 Vict. c. 109), and though, in consequence of the provisions of the Gaming Act, 1892, he would not be able to recover from the principal the amount of any losses paid in respect of the bets (*s*).

6. An agent sells a horse and receives the purchase-money. The sale is subsequently rescinded on the ground of the agent's fraud, and the purchase-money is repaid. The agent is not liable to the principal for the amount of the purchase-money (*t*).

(*p*) *Gillard v. Wise*, 1826, 5 B. & C. 134; 29 R. R. 190. And see *Pollard v. Bank of England*, 1871, L. R. 6 Q. B. 623; 40 L. J. Q. B. 233; *M'Carthy v. Colvin*, 1839, 8 L. J. Q. B. 158; 9 A. & E. 607; 48 R. R. 606.

(*q*) *Bousfield v. Wilson*, 1846, 16 L. J. Ex. 44; 16 M. & W. 185; *Farmer v. Russell*, 1798, 1 B. & P. 296; *Tenant v. Elliott*, 1797, 1 B. & P. 3; 4 R. R. 755.

(*r*) *Booth v. Hodgson*, 1795, 6 T. R. 405.

(*s*) *De Mattos v. Benjamin*, 1894, 63 L. J. Q. B. 248; *Bridger v. Savage*, 1885, 15 Q. B. D. 363; 54 L. J. Q. B. 464, C. A.; overruling *Beyer v. Adams*, 1857, 26 L. J. Ch. 841. As to the Gaming Act, 1892, see *post*, Article 70.

(*t*) *Murray v. Mann*, 1848, 2 Ex. 538; 17 L. J. Ex. 256; 76 R. R. 686.

7. An insurance broker receives notice that the assured under a policy is entitled to the return of a portion of certain premiums held by the broker. The broker is entitled to deduct such portion in an action by the underwriters for the full premiums, if he acts as agent for both parties (*u*).

8. A factor raises money by wrongfully pledging the goods of his principal. The principal may, if he thinks fit, adopt the transaction, and treat the money raised as money had and received to his use (*x*).

### Article 47.

#### ESTOPPED FROM DENYING PRINCIPAL'S TITLE.

Where a person is in possession of property as an agent, his possession, as evidence of title (*y*), and for the purpose of acquisition of title under the Statute of Limitations (*z*), is deemed to be the possession of the principal.

No agent is permitted to deny the title of his principal, or to set up the title of any third person in opposition to that of the principal, to any goods or chattels intrusted to him by, or which he has expressly or impliedly agreed to hold on behalf of, the principal (*a*). Provided, that where a third person is entitled to the goods or chattels as against

(*u*) *Shre v. Clarkson*, 1810, 12 East, 507; 11 R. R. 473.

(*x*) *Bunzi v. Stewart*, 1842, 5 Scott, N. R. 1, 26.

(*y*) *Hitchings v. Thompson*, 1850, 5 Ex. 50; 82 R. R. 560; *Last v. Dimm*, 1859, 28 L. J. Ex. 94.

(*z*) Illustrations 1 to 4; *Coojer v. De Tastet*, 1829, Tamlyn, 177.

(*a*) Illustrations 5 to 9; *Dixon v. Hammond*, 1819, 2 B. & A. 310; *Reberts v. Ogilby*, 1821, 9 Price, 269; 23 R. R. 671; *Scott v. Crawford*, 1842, 4 M. & G. 1031; 61 R. R. 750. See, however, Article 77.

the principal, and claims them from the agent, the agent may set up the title of that third person, if he does so on his behalf and by his authority, or if he has delivered up the goods or chattels to him, unless at the time when the goods or chattels were so intrusted to the agent, or when the agent so agreed to hold them on behalf of the principal, he had notice of the claim of such third person (b).

*Illustrations.*

1. An agent is permitted, for the convenient performance of his duties as such, to occupy premises belonging to his principal. The agent cannot acquire any estate therein, by reason of such occupation, even if he is permitted to use the premises for an independent business of his own (c). No agent can acquire an adverse title to his principal unless he can distinctly show that the acts upon which he relies were done in respect of his title, and not of his agency (d).

2. A. receives the rents of certain properties as an agent, and pays them into a separate account at his own bank. The principal dies intestate. A. continues to receive the rents for more than twelve years after the death of the principal, stating to several of the tenants that he is acting for the heir, whoever he may be. Subsequently, within a reasonable time after the heir is ascertained, his assignee brings an action against A., claiming possession of the property and an account of the rents and profits. A. claims the property as his own, and pleads the Statute of Limitations. The plaintiff is entitled to possession of the property, and an account of all

(b) Illustrations 10 and 11, and cases there cited; *Hunt v. Maniere*, 1864, 34 L. J. Ch. 142.

(c) *White v. Bayley*, 1861, 30 L. J. C. P. 253; 10 C. B. N. S. 227.

(d) *Att.-Gen. v. Corporation of London*, 1849, 19 L. J. Ch. 314; 2 Mac. & G. 247; 86 R. R. 92.

the rents and profits received by A. since the principal's death (e).

3. A solicitor paid off a mortgage debt due from a client, and entered into possession of the mortgaged property. Held, that he must be taken to have acted as the agent of the client, and therefore was not entitled to set up the Statute of Limitations in an action by the client for redemption (f).

4. A. receives the rents of certain property as B.'s agent for more than twelve years, and duly pays them over to B. B. thereby acquires a good prescriptive title to the property, in the absence of fraud, even if A. was the true owner (g). Possession by an agent, as such, does not preserve his adverse rights (g).

5. A. makes advances for the purpose of a mine, in order to obtain the ore, which he consigns to B. for sale, B. undertaking to account to him for the proceeds. B. cannot set up any paramount title to the ore, or dispute A.'s right to the proceeds, on the ground that there are rights of third persons existing independently of the contract between A. and B. (h).

6. A. buys goods on B.'s behalf, and delivers them to carriers at B.'s risk. A. is estopped from disputing B.'s title to the goods (i).

7. The servant of a wharfinger gives a receipt for certain goods, in which there is an undertaking to deliver the goods to A. The wharfinger will not be permitted to deny A.'s title to the goods on their arrival (k).

(e) *Lyell v. Kennedy*, 1889, 14 App. Cas. 437; 59 L. J. Q. B. 268, H. L. And see *Smith v. Bennett*, 1874, 30 L. T. 100.

(f) *Ward v. Carttar*, 1865, L. R. 1 Eq. 29.

(g) *Williams v. Potts*, 1871, L. R. 12 Eq. 149; 40 L. J. Ch. 775.

(h) *Zulueta v. Vincent*, 1851, 1 De G. M. & G. 315.

(i) *Green v. Maitland*, 1842, 4 Beav. 524.

(k) *Evans v. Nichol*, 1841, 4 Scott, N. R. 43. And see *Wood v. Tassell*, 1844, 6 Q. B. 234; 66 B. R. 374.

8. A warehouseman agrees to hold certain goods, described in a delivery order, on behalf of the transferee of such order. In an action by the transferee against the warehouseman for conversion of the goods, it is no defence that the goods in question were not separated from the bulk, and that therefore the property in the goods had not passed to the plaintiff (*l*). A warehouseman or wharfinger is an agent for the person in whose name he holds, or on whose behalf he has undertaken to hold, goods, and is not permitted to set up the title of any other person (*m*).

9. A. delivers goods to a carrier, consigned to B. The property in the goods has not, in fact, passed to B. A. countermands his instructions, and the carrier re-delivers the goods to him. The carrier may set up A.'s title, in an action by B., carriers not being, as such, agents of their consignees (*n*).

10. A. wrongfully distrains B.'s goods and delivers them to C., an auctioneer, for sale, C. having at the time no knowledge of B.'s adverse claim. B. subsequently gives notice of his title to C., and claims the proceeds. C. may set up the title of B., in an action by A. for the proceeds, provided that he defends on B.'s behalf and with his authority (*o*).

11. A. sells goods as B.'s agent, having at the time when the goods are intrusted to him notice that C. claims them.

(*l*) *Woodley v. Coventry*, 1863, 32 L. J. Ex. 185; *Stonard v. Dunkin*, 1810, 2 Camp. 344; 11 R. R. 724.

(*m*) *Betteley v. Reed*, 1843, 4 Q. B. 511; 12 L. J. Q. B. 172; 62 R. R. 417; *Holl v. Griffin*, 1833, 3 L. J. C. P. 17; 10 Bing. 246; 38 R. R. 817; *Gosling v. Birnie*, 1831, 7 Bing. 339; 33 R. R. 497; *Henderson v. Williams*, (1895) 1 Q. B. 521; 64 L. J. Q. B. 308, C. A.

(*n*) *Sheridan v. New Quay Co.*, 1858, 28 L. J. C. P. 58; 4 C. B. N. S. 618; 114 R. R. 873.

(*o*) *Biddle v. Bond*, 1865, 34 L. J. Q. B. 137; 6 B. & S. 225; *Ross v. Edwards*, 1895, 73 L. T. 100, P. C.; *Rogers v. Lambert*, (1891) 1 Q. B. 318; 60 L. J. Q. B. 187, C. A.; *Thorne v. Tilbury*, 1858, 27 L. J. Ex. 407; 3 H. & N. 534; 117 R. R. 844.

A. cannot, in an action by B. for the proceeds, set up the title of C., even if C. was wrongfully deprived of the goods by B., A. having elected to act as B.'s agent for the sale of the goods after receiving notice of C.'s adverse claim (p).

*DUTIES ARISING FROM THE FIDUCIARY CHARACTER  
OF THE RELATIONSHIP.*

**Article 48.**

DUTY TO MAKE FULL DISCLOSURE WHERE ANY  
PERSONAL INTEREST.

No agent is permitted to enter, as such, into any transaction in which he has a personal interest in conflict with his duty to his principal, unless the principal, with a full knowledge of all the material circumstances, and of the exact nature and extent of the agent's interest, consents (q). Where any transaction is entered into in violation of this principle, the principal, when the circumstances come to his knowledge, may repudiate the transaction, or may affirm it and recover from the agent any profit made by him in respect thereof (r).

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(p) *Ex p. Davies, Re Sadler*, 1881, 19 Ch. Div. 86, C. A.

(q) *Rothschild v. Brookman*, 1831, 2 Dow & Cl. 1888; 30 R. R. 147, H. L.; *Parker v. McKenna*, 1874, L. R. 10 Ch. 96; 44 L. J. Ch. 425; *Gardner v. McCutcheon*, 1842, 4 Beav. 534; 55 R. R. 114; *E. I. Co. v. Henchman*, 1791, 1 Ves. jun. 289; *Re Birt, Birt v. Burt*, 1883, 22 Ch. D. 604; 52 L. J. Ch. 397; *Tiessen v. Henderson*, (1899) 1 Ch. 861; 68 L. J. Ch. 353; *King v. Howell*, 1910, 27 T. L. R. 114, C. A. And see Illustrations.

(r) *Rothschild v. Brookman*, *supra*; *Bentley v. Craven*, 1853, 18 Beav. 76; 104 R. R. 373; *Burton v. Wookey*, 1822, 6 Madd. 367; 23 R. R. 249. And see Illustrations to this Article, and to Article 53.

*Illustrations.*

1. A stockbroker was employed to purchase certain shares. He purchased the shares from his own trustee without informing the principal of the fact. The transaction was set aside, after an interval of many years, without inquiry whether a fair price was charged or not (*s*).

2. A director of a company enters into a contract on behalf of the company with a firm of which he is a member. The contract is voidable in equity by the company, quite apart from the question of its fairness or unfairness (*t*). It is the duty of a director to promote the interests of the company, and he will not be permitted to enter into engagements in which his own interest is in conflict with that duty (*t*).

3. A solicitor entered into an arrangement under which he was to receive a share of certain property, and also a share of the profit arising from the sale of such property. He subsequently acted as solicitor in purchasing a large portion of the property, without disclosing his interest therein to the client for whom he so acted. Held, that he was a trustee for the client for a proportionate part of the share taken by him, and that he must account for the full amount of the profit made by him upon the sale, with interest at the rate of 5 per cent. (*u*).

4. An auctioneer, who was employed to sell an estate, purchased it himself. The transaction was set aside, after an interval of thirteen years (*x*). No agent for the sale of property is permitted to purchase it himself, and no agent to purchase is permitted to buy his own property on the princi-

(*s*) *Gillett v. Peppercorne*, 1840, 3 Beav. 78; 52 R. R. 38. See also *Armstrong v. Jackson*, (1917) 2 K. B. 822; 86 L. J. K. B. 1375.

(*t*) *Aberdeen Rail. Co. v. Blakie*, 1854, 2 Eq. R. 1281, H. L. See also *Transvaal Lands Co. v. New Belgium, &c. Co.*, (1914) 2 Ch. 488; 84 L. J. Ch. 94, C. A.

(*u*) *Tyrrell v. Bank of London*, 1862, 10 H. L. Cas. 26; 31 L. J. Ch. 369.

(*x*) *Oliver v. Court*, 1820, Dan. 301; 22 R. R. 720.

pal's behalf, unless he makes full disclosure to the principal; and the fact that he pays or charges a fair price is immaterial in the application of this rule (*y*). So, an agent of a trustee for sale or of a mortgagee selling under his power of sale, who is employed as agent in the matter of the sale (*z*), cannot purchase the property sold (*a*); and a solicitor who conducts a sale of property must not purchase it without a full explanation to the vendor (*b*). But the auctioneer is not deemed to be an agent of the purchaser at a sale by auction, for this purpose, and may (probably) sell his own property at such a sale without disclosing that he is the owner (*c*).

5. A broker is employed to sell goods. He sells them, ostensibly to A., really to A. and himself jointly. While the goods are still in the possession of the broker, he becomes bankrupt, A. also being insolvent. The principal may repudiate the contract and recover the goods specifically from the trustee in bankruptcy of the broker (*d*).

6. A firm of brokers were authorized to purchase goods. They delivered bought notes to the principal, which purported to be notes of a contract of which the brokers guaranteed performance, but which did not disclose the sellers. The principal paid the brokers their commission and a deposit, and subsequently discovered that one of the brokers intended to perform the contract himself. The principal was held to be entitled to repudiate the contract, and the brokers

(*y*) *Lowther v. Lowther*, 1806, 13 Ves. 95, 102; *Massey v. Davies*, 1794, 2 Ves. jun. 317; 2 R. R. 218; *Bentley v. Craven*, 1853, 18 Beav. 75; 104 R. R. 373; *Rothschild v. Brookman*, 1831, 2 Dow & Cl. 188; 30 R. R. 147, H. L.

(*z*) See *Nutt v. Easton*, (1900) 1 Ch. 29; 69 L. J. Ch. 46, C. A.

(*a*) *Whitcomb v. Minchin*, 1820, 5 Madd. 91; *Martinson v. Clowes*, 1882, 21 Ch. D. 857; 51 L. J. Ch. 594; *Laurance v. Galsworthy*, 1857, 3 Jur. N. S. 1049.

(*b*) *Re Bloye's Trust*, 1849, 19 L. J. Ch. 89; 1 Mac. & G. 488; 84 R. R. 134; *Ex p. James*, 1803, 8 Ves. 337; 7 R. R. 56.

(*c*) *Flint v. Woodin*, 1852, 9 Hare, 618; 89 R. R. 602.

(*d*) *Ex p. Huth, Re Pemberton*, 1840, 4 Dea. 294.



were ordered to repay the deposit and commission, with interest (*e*). No agent can become a principal and deal on that footing without full and fair disclosure (*f*).

7. An agent for sale sells to a company of which he is a director and large shareholder. The sale is not binding on the principal (*g*). Where an agent for sale takes any interest in a purchase negotiated by him, he must fully disclose all the material facts, and the exact nature and extent of his interest. It is not sufficient to merely disclose that he has an interest, or to make such statements as would put the principal on inquiry. The burden of proving full disclosure lies on the agent (*h*).

8. A director of a railway company purchased, on the company's behalf, the concession of a line of which he was the concealed owner. Held, that the company might repudiate the transaction (*i*). So, where a director sold a vessel to his company as from a stranger, it was held that he must account to the company for the profit made by him, with interest (*k*). In such cases, the principal may rescind the transaction, or may affirm it and claim the profit made, at his option (*l*).

9. *Special customs inconsistent with this Article are unreasonable.*—A broker is authorized to sell certain shares,

(*e*) *Wilson v. Short*, 1847, 17 L. J. Ch. 289; 6 Hare, 366; 77 R. R. 139.

(*f*) *Ibid.*; *Williamson v. Barbour*, 1877, 9 Ch. Div. 529; 50 L. J. Ch. 147; *Robinson v. Mollett*, 1874, L. R. 7 H. L. 802; 44 L. J. C. P. 362, H. L. Article 70, Illustration 12.

(*g*) *Salomans v. Pender*, 1865, 34 L. J. Ex. 95; 3 H. & C. 639.

(*h*) *Dunne v. English*, 1874, L. R. 18 Eq. 524.

(*i*) *Gt. Luxembourg Rail. Co. v. Magnay*, 1858, 25 Beav. 586; 119 R. R. 555.

(*k*) *Benson v. Heathorn*, 1842, 1 Y. & Coll. C. C. 326; 57 R. R. 351.

(*l*) *Re Cape Breton Co.*, 1884, 26 Ch. Div. 221; 29 Ch. Div. 795, C. A.; *Cavendish Bentinck v. Fenn*, 1887, 12 App. Cas. 652, H. L.; *Tiessen v. Henderson*, (1899) 1 Ch. 861; 68 L. J. Ch. 353; *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*, (1899) 2 Ch. 392; 68 L. J. Ch. 699, C. A. And see Article 53, and Illustrations thereto.

and pay himself certain advances out of the proceeds. A custom whereby he may himself take over the shares at the price of the day in the event of his being unable to find a purchaser at an adequate price is unreasonable, and such a transaction is not binding on the principal unless he had notice of the custom at the time when he gave the broker the authority, even if it is proved that a forced sale of the shares would certainly have realised less than the price given by the broker (*m*). So, a custom whereby an agent for sale may purchase at the minimum price if he cannot find a purchaser is unreasonable (*n*). Every custom or usage which converts an agent into a principal, or otherwise gives him an interest at variance with his duty, is unreasonable, and no such custom or usage is binding on any principal who has not notice thereof (*o*).

#### Article 49.

AGENT WHO PURCHASES PROPERTY, AS SUCH, IN OWN  
NAME, IS A TRUSTEE.

Where an agent who is employed to purchase property on behalf of his principal, purchases it in his own name or on his own behalf, and it is conveyed or transferred or otherwise made over to him, he becomes a trustee thereof for the principal (*p*).

(*m*) *Hamilton v. Young*, 1881, 7 L. R. Ir. 289; *Rothschild v. Brookman*, 1831, 2 Dow & Cl. 188; 30 R. R. 147, H. L. See, however, Article 69, Illustration 13.

(*n*) *De Bussche v. Alt*, 1877, 8 Ch. Div. 286; 47 L. J. Ch. 381, C. A.

(*o*) *Robinson v. Mollett*, 1874, L. R. 7 H. L. 802; 44 L. J. C. P. 362, H. L. See, however, Article 69, Illustration 13.

(*p*) *Lees v. Nuttall*, 1834, 2 Myl. & K. 819; 31 R. R. 99; *Austin v. Chambers*, 1837, 6 Cl. & F. 1; 49 R. R. 1, H. L.; *Bartlett v. Pickersgill*, 1 Cox, 15; 1 R. R. 1; *James v. Smith*, (1891) 1 Ch. 384. See also *Taylor v. Salmon*, 1838, 4 Myl. & Cr. 139; 48 R. R. 34

## Article 50.

DUTY TO MAKE FULL DISCLOSURE WHERE HE DEALS  
WITH THE PRINCIPAL.

Where an agent enters into any contract or transaction with his principal, or with his principal's representative in interest, he must act with the most perfect good faith, and make full and fair disclosure of all the material circumstances, and of everything known to him respecting the subject-matter of the contract or transaction which would be likely to influence the conduct of the principal or his representative (*q*).

Where any question arises as to the validity of any such contract or transaction, or of any gift made by a principal to his agent, the burden of proving that no advantage was taken by the agent of his position, or of the confidence reposed in him, and that the transaction was entered into in perfectly good faith and after full disclosure, lies upon the agent (*q*).

Where a principal or his representative seeks to set aside any such contract or transaction, on the ground of want of disclosure or good faith, he must

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(*q*) *Molony v. Kernan*, 1842, 2 Dr. & War. 31; 59 R. R. 635; *Waters v. Shaftesbury*, 1866, 14 L. T. 184; *Charter v. Trevelyan*, 1842, 11 Cl. & F. 714; 65 R. R. 305, H. L.; *Savery v. King*, 1856, 5 H. L. Cas. 627; 25 L. J. Ch. 482; 101 R. R. 299, H. L.; *Ward v. Sharp*, 1883, 53 L. J. Ch. 313; *Jones v. Thomas*, 1837, 2 Y. & Coll. 498; 47 R. R. 449; *Consett v. Bell*, 1841, 1 Y. & Coll. C. C. 569; 57 R. R. 451; *Collins v. Hare*, 1828, 2 Bli. N. S. 106, H. L. And see Illustrations.

take proceedings for that purpose within a reasonable time after the circumstances he relies upon become known to him (*r*).

*Illustrations.*

1. A manager of a bank, who was permitted to carry on a separate business on his own account, made advances for the purposes of such business, upon bills which he had not indorsed. The drawers and acceptors of the bills became insolvent. Held, that the manager was bound to make good the loss. He ought not to have granted himself any accommodation nor acquired any personal benefit in the course of his agency, without bringing the whole circumstances most fully and fairly before the directors (*s*).

2. An agent for the management of trust property purchases part of such property from the *cestui que trust*. The agent, to support the transaction, must show not only that he gave full value, but also that he dealt at arm's length, and fully disclosed everything known to him which tended to enhance the value of the property (*t*).

3. A steward contracts with his employer for a lease. He must show that he is giving as high a rent as it would have been his duty to obtain from a third person, and that his employer was fully informed of every circumstance tending to demonstrate the value of the property which was, or ought to have been, within the steward's knowledge (*u*).

(*r*) Illustration 11. *De Montmorency v. Devereux*, 1840, 7 Cl. & F. 188, H. L.; *Champion v. Rigby*, 1830, 1 Russ. & M. 539; 31 R. R. 107; *Clanricarde v. Hemming*, 1860, 30 L. J. Ch. 865; 30 Beav. 175; *Lyddon v. Moss*, 1859, 4 De G. & J. 104; *Flint v. Woodin*, 1852, 9 Hare, 618; 89 R. R. 602.

(*s*) *Gwatkin v. Campbell*, 1854, 1 Jur. N. S. 131.

(*t*) *King v. Anderson*, 1874, 8 Ir. R. Eq. 147. And see *Dally v. Wonham*, 1863, 32 L. J. Ch. 790; 33 Beav. 154.

(*u*) *Selsey v. Rhoades*, 1824, 2 S. & S. 41; 25 R. R. 150; *Watt v. Grove*, 1805, 2 Sch. & Lef. 492.

4. A director proposes to contract with his company, it being provided by the articles of association that directors may contract with the company on disclosing their interest. It is his duty to declare the full extent and exact nature of his interest, not merely that he has an interest (*x*).

5. A solicitor purchases property from his client's trustee in bankruptcy. He must make a full disclosure of all the knowledge acquired by him respecting such property during the time when he was acting as solicitor for the bankrupt (*y*).

6. A solicitor purchased property from a former client, and concealed a material fact. The transaction was set aside, although there was another solicitor acting on behalf of the plaintiff (*z*). But the rule that an agent must disclose knowledge acquired by him as such, does not, in general, apply where the agent has ceased to act, and there is another agent, with equal means of knowledge, acting for the principal in the transaction (*a*).

7. An agent purchases his principal's property in the name of a third person. The transaction will be set aside without inquiry as to the adequacy of the price. An agent may purchase property from his principal, provided that he deals at arm's length and fully discloses all that he knows respecting the property; but if any underhand dealing or conceal-

(*x*) *Imperial Mercantile Credit Co. v. Coleman*, 1873, L. R. 6 H. L. 189; 42 L. J. Ch. 644, H. L.; *Gluckstein v. Barnes*, (1900) A. C. 240; 69 L. J. Ch. 385, H. L. Comp. *Chesterfield Colliery Co. v. Black*, 1878, 37 L. T. 740.

(*y*) *Luddy's Trustees v. Peard*, 1886, 33 Ch. Div. 500; 55 L. J. Ch. 884. And see *Boswell v. Coaks*, 1884, 27 Ch. D. 424, C. A.; 11 App. Cas. 232, H. L.

(*z*) *Gibbs v. Daniel*, 1862, 4 Giff. 1.

(*a*) *Scott v. Dunbar*, 1828, 1 Moll. 442. And see *Edwards v. Meyrick*, 1842, 2 Hare, 60; 62 R. R. 23; *Montesquieu v. Sandys*, 1811, 18 Ves. 302; 11 R. R. 197.

ment appears, the transaction will at once be set aside on the application of the principal (*b*).

8. A director of a railway company contracted with the company to take refreshment rooms. The Court refused to decree specific performance of the contract against the company (*c*).

9. A solicitor takes a mortgage from his client. The Court will not enforce any unusual stipulations in the mortgage disadvantageous to the client (*d*), and will restrain the solicitor from exercising his rights as mortgagee in an unfair or inequitable manner (*e*). Where a power of sale exerciseable at any time was inserted in such a mortgage without the usual proviso requiring interest to be in arrear or notice to be given, and the solicitor sold the property under the power, he was held liable to the client in damages as for an improper sale, it not being shown that he had explained to the client the unusual nature of the power (*f*). Prior to the Mortgagees' Legal Costs Act, 1895 (58 & 59 Vict. c. 25), if the solicitor himself prepared the mortgage deed, he was only permitted to charge out of pocket expenses, unless there was an express agreement to the contrary (*g*);

(*b*) *McPherson v. Watt*, 1877, 3 App. Cas. 254, H. L.; *Murphy v. O'Shea*, 1845, 8 Ir. Eq. Rep. 329; 69 R. R. 337; *Crowe v. Bullard*, 1790, 2 Cox, 253; 1 R. R. 122; *Lewis v. Hillman*, 1852, 3 H. L. Cas. 607; 88 R. R. 233, H. L.; *Cane v. Allen*, 1814, 2 Dow, 289, H. L.; *Uppington v. Bullen*, 1812, 2 Dr. & War. 184.

(*c*) *Flanagan v. G. W. Rail. Co.*, 1868, 19 L. T. 345.

(*d*) *Cowdry v. Day*, 1859, 29 L. J. Ch. 39; 1 Giff. 316; 114 B. R. 464; *Eyre v. Hughes*, 1876, 2 Ch. D. 148; 45 L. J. Ch. 395.

(*e*) *Macleod v. Jones*, 1883, 24 Ch. Div. 289; 53 L. J. Ch. 145, C. A.; *Pearson v. Benson*, 1860, 28 Beav. 598.

(*f*) *Readdy v. Prendergast*, 1887, 56 L. T. 790, C. A.; *Cockburn v. Edwards*, 1851, 18 Ch. Div. 449; 51 L. J. Ch. 46, C. A.; *Cradlock v. Rogers*, 1884, 53 L. J. Ch. 968, C. A. Comp. *Pooley v. Whetham*, 1886, 2 T. L. R. 808, C. A.

(*g*) *Re Wallis, Ex p. Lickorish*, 1890, 25 Q. B. D. 176; 59 L. J. Q. B. 500, C. A.; *Re Roberts*, 1889, 43 Ch. Div. 52; 59 L. J. Ch. 25.

but that Act provides that he shall be entitled in such a case to his usual remuneration as a solicitor (*h*).

10. A solicitor purchases property from his client. He must show that the price was adequate, that he took no advantage of his position, and that the sale was as advantageous to the client as any that the solicitor could have obtained, with the exercise of due diligence, from a third person (*i*).

11. A bill to set aside the purchase of property by an agent was dismissed, with costs, on proof that the principal had distinct notice, at the time of the transaction, that the agent was one of the beneficial purchasers, no proceedings having been taken to set it aside for more than six years, and the property having advanced in value in the meantime (*k*).

#### *Gifts to Agents.*

12. A client, who had recovered certain property after protracted litigation, shortly afterwards conveyed, by deed of gift, a valuable portion of such property to the counsel engaged on his behalf, in consideration of services, &c. rendered in connection with its recovery. The deed was set aside on the ground of want of independent advice (*l*). So,

(*h*) See *Re Norris*, (1902) 1 Ch. 741; 71 L. J. Ch. 187; *Day v. Kelland*, (1900) 2 Ch. 745; 70 L. J. Ch. 3, C. A.

(*i*) *Savery v. King*, 1856, 5 H. L. Cas. 627; 25 L. J. Ch. 482; 101 R. R. 299; *Pisani v. Gibraltar*, 1874, L. R. 5 P. C. 516, P. C.; *Spencer v. Topham*, 1856, 22 Beav. 573; 111 R. R. 488; *Gibson v. Jeyes*, 1801, 6 Ves. 266; 5 R. R. 295; *Holman v. Loynes*, 1854, 23 L. J. Ch. 529; 4 De G. M. & G. 270; 102 R. R. 127; *Gresley v. Mousley*, 1862, 31 L. J. Ch. 537; *Wright v. Carter*, (1903) 1 Ch. 27; 72 L. J. Ch. 138, C. A.; *Moody v. Cox*, (1917) 2 Ch. 71; 86 L. J. Ch. 424, C. A.

(*k*) *Wentworth v. Lloyd*, 1864, 10 H. L. Cas. 589, H. L. Comp. *De Bussche v. Alt*, 1877, 8 Ch. Div. 286, C. A.; *Savery v. King*, 1856, 5 H. L. Cas. 627.

(*l*) *Broun v. Kennedy*, 1864, 33 L. J. Ch. 342; 4 De G. J. & S. 217; *Rhodes v. Bute*, 1865, L. R. 1 Ch. 252; 35 L. J. Ch. 267.

where a client settled property in trust for himself for life, and then for his niece, who was the wife of his solicitor, for her separate use, the deed was set aside, on the ground that the client had not had independent advice (*m*). A solicitor is not permitted to bargain with his client for any benefit beyond the amount of his legal remuneration, and during the time he is acting as solicitor for the client is incapable of accepting any gift or reward besides such remuneration, even if there is no suspicion of any fraud, misrepresentation or undue influence (*n*). The executor of a deceased client was held to be entitled to have a gift from the deceased to her solicitor set aside, although the deceased, after the confidential relationship had ceased, had expressed her intention to abide by the gift, the circumstances not being such as would have debarred her, at the time of her death, from having it set aside (*o*). This principle does not, however, apply to gifts by will (*p*); and, except in the case of solicitor and client, the general rule is that a gift *inter vivos* from principal to agent is valid if the agent proves that there was no undue influence on his part (*q*).

(*m*) *Liles v. Terry*, (1895) 2 Q. B. 679; 65 L. J. Q. B. 34, C. A. See also *Lloyd v. Cook*, (1915) 1 K. B. 242; 84 L. J. K. B. 567.

(*n*) *Morgan v. Minett*, 1877, 6 Ch. Div. 638; *O'Brien v. Lewis*, 1863, 32 L. J. Ch. 569; *Wright v. Proud*, 1806, 13 Ves. 138; 53 R. R. 22; *Tomson v. Judge*, 1855, 24 L. J. Ch. 785; 3 Drew. 306; *Middleton v. Welles*, 1785, 4 Bro. P. C. 245, H. L.; *Saunderson v. Glass*, 1742, 2 Atk. 297; *Wright v. Carter*, (1903) 1 Ch. 27; 72 L. J. Ch. 138, C. A. *Comp. Re Huslam*, (1902) 1 Ch. 765; 71 L. J. Ch. 734, C. A.

(*o*) *Tyars v. Alsop*, 1888, 59 L. T. 367, C. A.

(*p*) *Parfitt v. Lawless*, 1872, L. R. 2 P. 462; 41 L. J. P. 68; *Walker v. Smith*, 1861, 29 Beav. 394; *Hindson v. Weatherill*, 1854, 23 L. J. Ch. 820; 5 De G. M. & G. 301; 104 R. R. 134; *Barry v. Butlin*, 1838, 2 Moo. P. C. 480; 46 R. R. 123, P. C.

(*q*) *Hunter v. Atkins*, 1832, 3 Myl. & K. 113; 41 R. R. 30.



## Article 51.

MUST NOT USE MATERIAL OR INFORMATION ACQUIRED  
IN COURSE OF AGENCY.

No agent is permitted, unless with the consent of his principal, either during or after the termination of the agency, to make use in any manner prejudicial to the interests of the principal, of any materials or information acquired in the course of the agency (*r*).

## Article 52.

## DUTY TO ACCOUNT IN EQUITY.

It is the duty of every agent to render just and true accounts of his agency to the principal, and in cases of general agency of a fiduciary character the principal has a right to have an account taken in a court of equity (*s*). In the case of a single agency transaction untainted with fraud (*t*), or where the agency is not of a fiduciary character, the agent is

(*r*) *Robb v. Green*, (1895) 2 Q. B. 315; 64 L. J. Q. B. 593, C. A.; *Louis v. Smellie*, 1895, 73 L. T. 226, C. A.; *Lamb v. Evans*, (1893) 1 Ch. 218; 62 L. J. Ch. 404, C. A.; *Liverpool Victoria, &c. Socy. v. Houston*, 1901, 3 F. 42; *Kirchner v. Gruban*, (1909) 1 Ch. 413; 78 L. J. Ch. 117; *Amber Size, &c. Co. v. Menzel*, (1913) 2 Ch. 239; 82 L. J. Ch. 573.

(*s*) *Makepeace v. Rogers*, 1865, 34 L. J. Ch. 396; 4 De G. J. & S. 649; *Hemings v. Pugh*, 1863, 4 Giff. 456; *Bowles v. Orr*, 1835, 1 Y. & Coll. 464; *Finch v. Burden*, 1865, 12 L. T. 302.

(*t*) *Navulshaw v. Brownrigg*, 1852, 21 L. J. Ch. 908; 2 De G. M. & G. 441; 95 R. R. 156; *Phillips v. Phillips*, 1852, 22 L. J. Ch. 141; 9 Hare, 471.

not bound to render an account in a court of equity, unless the accounts are so complicated that they cannot be properly investigated in an action at law (*u*).

Settled accounts will not be re-opened (*x*), unless the agent has been guilty of fraud or undue influence, but the principal may be given leave to surcharge and falsify them (*y*). Where the agent has been guilty of fraud (*z*), or the accounts have been settled under undue influence (*a*), his accounts will be re-opened from the commencement of the agency, and in such a case lapse of time does not constitute a defence (*b*).

The illegality of a transaction entered into by an agent is not a bar to an action by the principal for an account thereof (*c*), unless the contract of agency is itself unlawful (*d*).

(*u*) *Barry v. Stevens*, 1862, 31 L. J. Ch. 785; 31 Beav. 258; *Hemings v. Pugh*, 1863, 4 Giff. 456; *King v. Rossett*, 1827, 2 Y. & J. 33; *Blyth v. Whiffin*, 1872, 27 L. T. 330.

(*x*) *M'Kellar v. Wallace*, 1853, 5 Moo. Ind. App. 372, P. C.; *Parkinson v. Hanbury*, 1867, L. R. 2 H. L. 1; 36 L. J. Ch. 293.

(*y*) *Hunter v. Belcher*, 1864, 2 De G. J. & S. 194; *Mozeley v. Cowie*, 1877, 47 L. J. Ch. 271.

(*z*) *Beaumont v. Boulbee*, 1802, 5 Ves. 485; 7 Ves. 599; 4 R. R. 244; *Clarke v. Tipping*, 1846, 9 Beav. 284; 73 R. R. 355; *Middleditch v. Sharland*, 1799, 5 Ves. 87; *Hardwicke v. Vernon*, 1808, 14 Ves. 504; 9 R. R. 329; *Wulsham v. Stainton*, 1863, 12 W. R. 63.

(*a*) *Watson v. Rodwell*, 1879, 11 Ch. D. 150; 48 L. J. Ch. 209, C. A.; *Coleman v. Mellersh*, 1850, 2 Mac. & G. 309; 86 R. R. 123; *Lewes v. Morgan*, 1817, 5 Price, 42; 19 R. R. 566; *Jones v. Moffett*, 1846, 3 J. & L. 636; *Ward v. Sharp*, 1883, 53 L. J. Ch. 313.

(*b*) See note (*z*), *supra*.

(*c*) *Sharp v. Taylor*, 1850, 2 Ph. 801; 78 R. R. 298; *Williams v. Trye*, 1354, 23 L. J. Ch. 860.

(*d*) *Knowles v. Haughton*, 1805, 11 Ves. 168; *Battersby v. Smyth*, 1818, 3 Madd. 110; *Sykes v. Beadon*, 1879, 11 Ch. D. 170.

The right of a principal to have an account taken in equity rests upon the trust and confidence reposed in the agent (*e*), and in all cases of general agency, the fiduciary character of the relationship is sufficient to support an action for an account, whether the accounts are complicated or not, and even if the receipts and payments are all on the one side (*f*). Thus, where an agent is employed to sell property, he may be compelled to account in equity for the proceeds (*g*). But the bare relationship of principal and agent is not sufficient, in the absence of fraud, where the agent is not employed in a fiduciary capacity, and the transaction can be fairly and properly investigated in a common law action (*h*). Thus, bankers are not bound to account in equity to their customers, unless the accounts in question are intricate and complicated (*i*). So, it was held that a person who was occasionally employed as a clerk by a solicitor was not bound to account in equity, though there had been mutual receipts and payments (*k*). Damages for neglect of duty cannot be passed in taking an account, the proper remedy for such damages being an action at law (*l*).

*Fraud*.—In cases of fraud or undue influence, accounts long since settled will be re-opened from the commencement of the agency. Proof of one fraudulent overcharge has been held sufficient to entitle the principal to have the agent's accounts re-opened for a period of twenty years (*m*). So, where there were incorrect entries, and amounts unexplained

(*e*) *Padwick v. Stanley*, 1652, 9 Hare, 627.

(*f*) See note (*s*), *ante*, p. 145.

(*g*) *Mackenzie v. Johnston*, 1819, 4 Madd. 373.

(*h*) See note (*u*), *ante*, p. 146.

(*i*) *Foley v. Hill*, 1848, 2 H. L. Cas. 28; 81 R. R. 14; affirming 13 L. J. Ch. 182.

(*k*) *Fluker v. Taylor*, 1855, 3 Drew. 183.

(*l*) *G. W. Ins. Co. v. Cunliffe*, 1874, L. R. 9 Ch. 525; 43 L. J. Ch. 741.

(*m*) *Williamson v. Barbour*, 1877, 9 Ch. Div. 529; 50 L. J. Ch. 147.

and unaccounted for, in the accounts of a deceased agent of a company, who was also a large shareholder in the company, his accounts were re-opened after his death, for a period of twenty-five years (*n*).

*Statutes of Limitations.*—It was formerly held that where an agent was sued in equity in a fiduciary capacity, he could not set up the Statutes of Limitations (*o*); but by virtue of the 8th section of the Trustee Act, 1888, he may now plead and is entitled to the benefit of the statutes, except where he is sued for money or property intrusted to him as an agent, or for the proceeds or value of any such property converted by him to his own use, or where he has been guilty of fraud (*p*). A right of action for an account is barred in equity, as well as at law, after six years from the time when the right of action accrued (*q*).

### Article 53.

#### DUTY TO ACCOUNT FOR ALL SECRET PROFITS.

No agent is permitted to acquire any personal benefit in the course of or by means of his agency without the knowledge and consent of the principal (*r*).

(*n*) *Stainton v. Carron Co.*, 1857, 27 L. J. Ch. 89; 24 Beav. 346; 116 R. R. 143.

(*o*) *Teed v. Beere*, 1859, 28 L. J. Ch. 782; 118 R. R. 882; *Burdick v. Garrick*, 1870, L. R. 5 Ch. 233; 39 L. J. Ch. 369; *Power v. Power*, 1884, 13 L. R. Ir. 281. See, however, *Re Friend, Friend v. Young*, (1897) 2 Ch. 421; 66 L. J. Ch. 737.

(*p*) *Re Lands Allotment Co.*, (1894) 1 Ch. 616; 63 L. J. Ch. 291, C. A.; *North American Land Co. v. Watkins*, (1904) 2 Ch. 233; 73 L. J. Ch. 626, C. A. See also *Henry v. Hammond*, (1913) 2 K. B. 515; 82 L. J. K. B. 575.

(*q*) *Knox v. Gye*, 1871, L. R. 5 H. L. 656; 42 L. J. Ch. 234. See, however, *The Pongola*, 1895, 73 L. T. 512.

(*r*) *Parker v. McKenna*, 1874, L. R. 10 Ch. 96; 44 L. J. Ch. 425;

Every agent must account to the principal for every benefit, and pay over to the principal every profit, acquired by him in the course or by means of the agency without such knowledge and consent (*r*), even if, in acquiring the benefit or profit, he incurred a risk of loss (*s*), and the principal suffered no injury thereby (*t*).

Where a principal knows that his agent will receive remuneration from third persons in the course of the agency, and acquiesces in his so doing under a misapprehension as to the extent of the remuneration, such remuneration is not a benefit or profit acquired without the consent of the principal within the meaning of this Article, unless the agent misinformed or intentionally misled him as to the extent thereof, or, knowing that he laboured under such a misapprehension, neglected to correct it (*u*).

### *Illustrations.*

1. An agent purchases a debt due from his principal to a third person. He is only entitled to recover from his principal the amount he actually paid for the debt (*x*).

*Morison v. Thompson*, 1874, L. R. 9 Q. B. 480; 43 L. J. Q. B. 215; *Imp. Mercantile Credit Co. v. Coleman*, 1873, L. R. 6 H. L. 189; 42 L. J. Ch. 644; *Smith v. Lay*, 1856, 3 Kay & J. 105; 112 R. R. 57; *Cohen v. Kushke*, 1900, 83 L. T. 102. And see Illustrations.

(*s*) *Williams v. Stevens*, 1866, L. R. 1 P. C. 352; 36 L. J. P. C. 21; *Burrell v. Mossop*, 1888, 4 T. L. R. 270, C. A.

(*t*) *Parker v. McKenna*, 1874, L. R. 10 Ch. 96; 44 L. J. Ch. 425; *Tarkwa Main Reef v. Merton*, 1903, 19 T. L. R. 367.

(*u*) Illustration 15. See also *Holden v. Webber*, 1860, 29 Beav. 117.

(*x*) *Reed v. Norris*, 1837, 3 My. & C. 361, 374; 6 L. J. Ch. 197; 45 R. R. 88.

2. A barrister who was employed as a legal adviser and confidential agent, having acquired a knowledge of the extent of his client's property and liabilities, purchased certain charges on the client's estates for less than their nominal value, after he had ceased to act for the client. Held, that he was only entitled to recover from the client the amount actually paid for the charges, with interest, he having purchased them without the consent of the client (*y*). The employment of a person in such a capacity disables him from purchasing any such charges, or otherwise obtaining a personal benefit in the course of his employment, except with the principal's permission, and the disability continues for so long after the fiduciary relation has ceased as the reasons on which it is founded continue to operate (*y*).

3. A. consigned a ship to B. for sale at a minimum price. B., with A.'s consent, employed C. to sell the ship. C., being unable to find a purchaser, bought the ship himself at the minimum price without the consent of A., and subsequently resold her at a large profit. Held, that C. must account to A. for the profit (*a*). So, where a sub-agent, employed to procure an advance, received a secret commission from the persons making the advance, it was held that he was accountable for such commission to the principal (*b*). So, where a broker is instructed to buy shares at a certain price, he must account for the profit if he obtains the shares at less than that price (*c*). Where an agent makes a secret profit in the course of his employment, and there are no

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(*y*) *Carter v. Palmer*, 1841, 8 Cl. & F. 657; 54 R. R. 145, H. L.; *Hobday v. Peters*, 1860, 29 L. J. Ch. 780; 28 Beav. 349. And see *Patten v. Hamilton*, (1911) 1 Ir. R. 46, C. A.

(*a*) *De Bussche v. Alt*, 1877, 8 Ch. D. 286; 47 L. J. Ch. 381, C. A. And see *Barker v. Harrison*, 1846, 2 Coll. 546.

(*b*) *Powell v. Jones*, (1905) 1 K. B. 11; 74 L. J. K. B. 115, C. A.

(*c*) *Thompson v. Meade*, 1891, 7 T. L. R. 698. Comp. *Platt v. Rowe*, 1909, 26 T. L. R. 49; *Stubbs v. Slater*, (1910) 1 Ch. 632; 79 L. J. Ch. 420, C. A.

accounts remaining to be taken between him and his principal, he is bound to pay over such profit as money had and received to the use of the principal (*d*).

4. A partner, in negotiating the transfer of a lease on behalf of the firm, stipulated for a personal benefit. Held, that he must account to the firm for the value of the benefit received (*e*).

5. A., having bought certain shares at 2*l.* each, and knowing that B. desired to purchase some, represented to B. that he could obtain them at 3*l.* or less, and asked B. to authorize him to buy at 3*l.* B. gave him the authority. A. then transferred his own shares to B. at 3*l.* each, representing that C. was the vendor. Held, that A. must account to B. for the profit of 1*l.* per share (*f*).

6. A. requested B. to provide an outfit for A.'s son. B. did so, and obtained certain discounts, but charged A. the full prices. The discounts were disallowed, although B. did not charge any commission as an agent (*g*).

7. A shipmaster, being authorized to employ his vessel to the best advantage, and being unable to procure remunerative freight, loaded her with a cargo of his own. Held, that he must account to the owners for the profit made by the sale of the cargo, and not merely for reasonable freight (*h*).

8. The managing owner of a ship, being a provision merchant, furnishes supplies for the ship. He is only entitled to charge cost prices, unless the other part-owners, with a

(*d*) *Morison v. Thompson*, 1874, L. R. 9 Q. B. 480; 43 L. J. Q. B. 215.

(*e*) *Fawcett v. Whitehouse*, 1829, 4 L. J. Ch. 64; 1 Russ. & M. 132; 32 R. R. 163. See also *Featherstonhaugh v. Fenwick*, 1811, 17 Ves. 298; 11 R. R. 78.

(*f*) *Kimber v. Barber*, 1872, L. R. 8 Ch. 56.

(*g*) *Turnbull v. Garden*, 1869, 20 L. T. 318. See also *Hippisley v. Knee*, (1905) 1 K. B. 1; 74 L. J. K. B. 68.

(*h*) *Shallcross v. Oldham*, 1862, 2 Johns. & H. 609.

full knowledge of the circumstances, consent to pay profit prices (*i*).

9. Commission agents, who are also merchants, are employed to ship and sell goods abroad. They do so, and purchase other goods with the proceeds. They are not bound to account for the profit on the sale of the goods bought with the proceeds, because such profit is not made in the course or by means of the agency. They are only bound to account for the proceeds of the goods sold on the principal's behalf (*k*).

10. A., a stockbroker, buys shares by B.'s instructions. B. fails to carry out the contract, so that A. is justified in selling the shares against him. A. has a fair price fixed by a jobber, and sells, and on his own account repurchases, the shares at that price. If it can be shown that by reason of the sale and repurchase being effected in one transaction A. was enabled to buy the shares at a lower price than he could have bought them at in the market in the ordinary way, he must account to B. for the difference (*l*).

11. A solicitor, who was retained by A. to act for him in negotiations for the purchase of a patent, had previously received a commission note from the owner of the patent agreeing to pay him commission in the event of a purchaser being found. A. purchased the patent, and the solicitor, with A.'s knowledge, received the commission from the seller. Held, that he was not accountable to A. for the commission, having made full disclosure (*m*).

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(*i*) *Ritchie v. Couper*, 1860, 28 Beav. 344. See also *Williamson v. Hine*, (1891) 1 Ch. 390; 60 L. J. Ch. 123.

(*k*) *Kirkham v. Peel*, 1881, 43 L. T. 171; 44 L. T. 195, C. A.

(*l*) *Erskine v. Sachs*, (1901) 2 K. B. 504; 70 L. J. K. B. 978, C. A.

(*m*) *Re Haslam*, (1902) 1 Ch. 765; 71 L. J. Ch. 734, C. A.



*Directors and Officers of Companies (n).*

12. The directors of a company, on the transfer of the business to another company, receive from the transferees, without the knowledge of the transferors, a large sum by way of compensation. They must pay over such sum to the first-mentioned company (o). Neither directors nor officers of a company are permitted to retain any pecuniary benefits acquired in the conduct of the company's business, unless the particulars of such benefits are fully explained to, and are approved of by, the shareholders (p). Nor does a clause in the articles of association providing that directors shall not be accountable to the company for any profits realised, by reason only of their holding that office or of the fiduciary relation thereby established, absolve directors who are also vendors to the company from liability to refund any profits in respect of

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(n) Promoters of a company are not allowed to make secret profits in their dealings with the company. See *Erlanger v. New Sombrero Phosphate Co.*, 1878, 3 App. Cas. 1218; 48 L. J. Ch. 73, H. L.; *Bagnall v. Carlton*, 1877, 6 Ch. Div. 371; 47 L. J. Ch. 30, C. A.; *Lydney Iron Ore Co. v. Bird*, 1886, 33 Ch. Div. 85; 55 L. J. Ch. 875, C. A.; *Emma Silver Mining Co. v. Lewis*, 1879, 4 C. P. D. 396; 48 L. J. C. P. 257; *Same v. Grant*, 1877, 11 Ch. Div. 918; *Whaley Bridge Calico Co. v. Green*, 1879, 5 Q. B. D. 109; 49 L. J. Q. B. 326; *Hichens v. Congreve*, 1831, 4 Sim. 420; *Re Sale Hotel, &c., Ex p. Hesketh*, 1898, 78 L. T. 368, C. A.; *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, C. A.; *Re Lady Forrest Gold Mine*, (1901) 1 Ch. 582; 70 L. J. Ch. 275; *Re Leeds, &c. Theatre of Varieties*, (1902) 2 Ch. 809; 72 L. J. Ch. 1, C. A.; *Omnium Electric Palaces v. Baines*, (1914) 1 Ch. 332; 83 L. J. Ch. 372, C. A.

(o) *Gaskell v. Chambers*, 1858, 28 L. J. Ch. 385; 26 Beav. 360.

(p) *General Exchange Bank v. Horner*, 1869, L. R. 9 Eq. 480; *York, &c. Rail. Co. v. Hudson*, 1853, 22 L. J. Ch. 529; 16 Beav. 485; 96 R. R. 228; *Ex p. Hill*, 1862, 32 L. J. Ch. 154; *Mann v. Edinburgh Tramways Co.*, 1892, 9 T. L. R. 102, H. L.; *Re Oxford Building Society*, 1886, 35 Ch. D. 502; 56 L. J. Ch. 98; *Kaye v. Croydon Tramways Co.*, (1898) 1 Ch. 358; 67 L. J. Ch. 222, C. A.; *Gluckstein v. Barnes*, (1908) A. C. 240; 69 L. J. Ch. 385, H. L.; *Shaw v. Holland*, (1900) 2 Ch. 305; 69 L. J. Ch. 621, C. A. Comp. *Re Dover Coalfield Extension, Ltd.*, (1908) 1 Ch. 65; 77 L. J. Ch. 94, C. A.

the sale, of which they have not made a full and explicit disclosure (*q*).

13. A director of a company, established for acquiring and working ships, with the consent of his co-directors, but without the knowledge of the shareholders, undertook the office of ship's husband. Held, that he must refund to the company, with interest, all moneys received by him for commission and brokerage as ship's husband (*r*). So, a solicitor-director is not permitted to receive any remuneration for his services, professional or otherwise, unless such remuneration is sanctioned by resolution of the shareholders (*s*).

14. A. agreed to become a director of a company on condition that the promoters indemnified him in respect of the amount paid for qualification shares. A. afterwards resigned, and the promoters, in pursuance of the agreement, purchased the shares (which had become valueless) from him at the original price. Held, that A. must account to the company for the value of the indemnity constituted by his secret agreement with the promoters—*i.e.*, for the original price of the shares (*t*). So, where the first five directors of a company, being bound to each hold twenty qualification shares, accepted that number from the promoter with the knowledge and approval of each other, it was held that they were jointly and severally liable to pay to the liquidator of the company the original value of such shares (*u*).

15. *Misapprehension as to extent of remuneration.*—It is usual for underwriters to allow insurance brokers, for

(*q*) *Gluckstein v. Barnes, supra.* Comp. *Costa Rica Rail. v. Forwood*, (1901) 1 Ch. 746; 70 L. J. Ch. 385, C. A.

(*r*) *Benson v. Heathorn*, 1842, 1 Y. & Coll. C. C. 326; 57 R. R. 351.

(*s*) *N. E. Rail. Co. v. Jackson*, 1870, 19 W. R. 198.

(*t*) *In re North Australian Territory Co., Archer's case*, (1892) 1 Ch. 322, C. A.

(*u*) *In re Carriage Supply Association*, 1884, 27 Ch. D. 322; 53 L. J. Ch. 1154.

punctual payment of premiums, ten per cent. cash discount, or twelve per cent. calculated on the yearly profits, in addition to the ordinary commission of five per cent. on each re-insurance. A company, having made no inquiry as to the remuneration paid by the underwriters, and not being aware of the twelve per cent. allowance, employed an insurance agent to negotiate its business. After the agent (who received no remuneration from the company) had been paid the usual allowance of twelve per cent. for more than eight years, the company discovered it and claimed to have it paid over to them as secret profit. It was held that they were not entitled to recover (*x*). This decision has been followed by the Court of Appeal in a later case, on the ground that every person who employs another as his agent with the knowledge that the agent receives remuneration from third persons, and who does not choose to inquire what the charges of the agent will be, must allow all the usual and customary charges of such an agent, and is not entitled to dispute them because he was not aware of the extent of the remuneration usually received by such agents (*y*).

*Note.*—In *Re Cape Breton Co.* (*z*), the Court of Appeal, affirming the decision of Pearson, J., held that where an agent secretly sells to his principal goods which were the property of the agent before the commencement of the agency, and the principal declines to rescind the contract, or rescission has become impossible, the agent cannot, in the absence of misrepresentation (*a*), be called upon to account for the profit made by him upon the transaction, or for the

(*x*) *Great Western Ins. Co. v. Cunliffe*, 1874, L. R. 9 Ch. 525. See also *Norreys v. Hodgson*, 1897, 13 T. L. R. 421, C. A.

(*y*) *Baring v. Stanton*, 1876, 3 Ch. D. 502, C. A. *Comp. Queen of Spain v. Parr*, 1869, 39 L. J. Ch. 73; *Green v. Tughan*, 1913, 30 T. L. R. 64.

(*z*) 1884, 26 Ch. D. 221; 29 Ch. D. 795, C. A.; *Ladywell Mining Co. v. Brookes*, *Same v. Huggons*, 1887, 35 Ch. D. 400; 56 L. J. Ch. 684, C. A.; *Re Lady Forrest Gold Mine*, (1901) 1 Ch. 582; 70 L. J. Ch. 275.

(*a*) See *Hichens v. Congreve*, 1831, 4 Sim. 420; *Re Leeds, &c. Theatre of Varieties*, (1902) 2 Ch. 809; 72 L. J. Ch. 1, C. A.

difference between the contract price and the market value (*b*). This decision has been approved by the Judicial Committee of the Privy Council in *Burland v. Earle* (*c*), where a director, not purporting to act for the company and under circumstances not making him a trustee for the company, purchased property, and subsequently sold it to the company at an enhanced price, without disclosing the profit, and it was held that, whether or not the company was entitled to rescind the transaction, it was not entitled to affirm it and claim the profit.

#### SPECIAL DUTIES OF PARTICULAR CLASSES OF AGENTS.

##### 1.—*Factors*.

It is the duty of a factor—

- (1) to give his principal the free and unbiassed use of his judgment and discretion (*d*);
- (2) to act in person, unless authorized to delegate his authority (*e*);
- (3) to keep and render just and true accounts (*d*);
- (4) to keep the property of the principal separate from his own and from that of other persons (*d*);
- (5) to keep each sale distinct and separate from other transactions (*f*);
- (6) to account for goods sold, pay over the proceeds, and deliver unsold goods to the principal, on demand (*g*);

(*b*) On appeal to the House of Lords, *sub nomine Cavendish Bentinck v. Fenn*, 1887, 12 A. C. 652; the decision was affirmed on other grounds.

(*c*) (1902) A. C. 83; 71 L. J. P. C. 1. Cp. *Cook v. Deeks*, (1916) 1 A. C. 554; 85 L. J. P. C. 161, P. C.

(*d*) *Clarke v. Tipping*, 1846, 9 Beav. 284; 73 R. R. 355; *Gray v. Haig*, 1854, 20 Beav. 219; 109 R. R. 396.

(*e*) *Cockran v. Irlam*, 1813, 2 M. & S. 301; 15 R. R. 257. And see Article 40.

(*f*) *Guerreiro v. Peile*, 1820, 2 B. & A. 616; 22 R. R. 500.

(*g*) *Topham v. Braddick*, 1809, 1 Taunt. 572; 10 R. R. 610.

- (7) to keep goods entrusted to him for sale with as much care as would be taken by a prudent man in respect of his own goods (*h*), and not to barter (*i*) or pledge them (*j*) unless expressly authorized to do so;
- (8) to insure goods consigned to him, if instructed to do so, or if he has been in the habit of doing so (*k*);
- (9) not to purchase the principal's goods for himself, without full and fair disclosure (*l*).

## 2.—Brokers.

It is the duty of a broker—

- (1) to contract in the name of the principal, subject to any special instructions or usage to the contrary (*m*);
- (2) to execute contracts in such a way as to be legally binding on both parties (*n*), and so as to give each party a right to sue thereon (*o*);
- (3) to inform his principal of the actual terms of any contract made on his behalf (*p*);
- (4) to comply with statutory provisions, in entering

(*h*) *Coggs v. Bernard*, 2 Ld. Raym. 909, 918.

(*i*) *Guerreiro v. Peile*, 1820, 3 B. & A. 616; 22 R. R. 500.

(*j*) *Martini v. Coles*, 1813, 1 M. & S. 140; *Gill v. Kymer*, 1821, 5 Moo. 503; *Fielding v. Kymer*, 1821, 2 B. & B. 639.

(*k*) *Smith v. Lascelles*, 1788, 2 T. R. 187; 1 R. R. 457.

(*l*) *Clarke v. Tipping*, 1846, 9 Beav. 284; 73 R. R. 355.

(*m*) *Baring v. Corrie*, 1818, 2 B. & A. 137; 20 R. R. 383. See Article 39, Illustration 8.

(*n*) *Grant v. Fletcher*, 1826, 5 B. & C. 436; 29 R. R. 286.

(*o*) Article 39, Illustrations 9 and 10.

(*p*) *Johnson v. Kearley*, (1908) 2 K. B. 514; 77 L. J. K. B. 904, C. A. Comp. *Stubbs v. Slater*, (1910) 1 Ch. 632; 79 L. J. Ch. 420, C. A. And see Article 70, Illustration 12.

- into contracts, notwithstanding a custom amongst brokers to disregard such provisions (*q*);
- (5) to make a careful estimate of the value of goods which he is instructed to sell, so that he may not sell them for less than their value (*r*);
- (6) to exercise his skill and fairly communicate his opinion to his principal (*s*);
- (7) not to deliver goods sold by him, except in accordance with the terms of sale (*t*);
- (8) not to sell his own property to his principal, nor buy the principal's property himself, without full and fair disclosure (*u*).

It is not part of his duty, in the absence of a special contract or custom, to examine goods bought by him, for the purpose of ascertaining whether they are of the quality bought (*x*).

### 3.—*Shipmasters.*

It is the duty of a shipmaster to give the whole of his time to the service of his principal, and therefore not to trade on his own account (*y*), nor give any portion of his personal services to another (*z*). A custom for shipmasters to trade on their own account is, apparently, unlawful (*y*).

(*q*) *E.g.*, Leeman's Act (30 Vict. c. 29); *Neilson v. James*, 1882, 9 Q. B. D. 546; 51 L. J. Q. B. 369, C. A.

(*r*) *Solomon v. Barker*, 1862, 2 F. & F. 726.

(*s*) *Ex p. Dyster*, 1816, 2 Rose, 349.

(*t*) *Boorman v. Brown*, 1842, 11 C. & F. 1; 61 R. R. 287.

(*u*) *Wilson v. Short*, 1847, 6 Hare, 366; 77 R. R. 139; *Tetley v. Shand*, 1872, 25 L. T. 658; *Rothschild v. Brookman*, 1831, 2 Dow & Cl. 188; 30 R. R. 147, H. L.; *Ex p. Huth, Re Pemberton*, 1840, Mont. & Ch. 667. See, however, Article 69, Illustration 13.

(*x*) *Zwilchenbart v. Alexander*, 1860, 1 B. & S. 234; 30 L. J. Q. B. 254, Ex. Ch.

(*y*) *Gardner v. M'Cutcheon*, 1842, 4 Beav. 534; 55 R. R. 114.

(*z*) *Thompson v. Havelock*, 1808, 1 Camp. 527; 10 R. R. 744.

4.—*Auctioneers.*

It is the duty of an auctioneer—

- (1) to act in person (*a*);
- (2) to sell for ready money only, in the absence of instructions to the contrary (*b*);
- (3) to disclose his principal (*c*);
- (4) to see that the deposit is duly paid (*d*), and if it be paid to him, to hold it as stakeholder until the completion of the transaction (*e*);
- (5) to sell to a third person (*f*);
- (6) to accept the highest *bonâ fide* bid, where he sells without reserve, notwithstanding express instructions from his principal to the contrary (*g*);
- (7) to account for the proceeds of goods sold, to the person from whom he received them (*h*);
- (8) not to deliver goods sold until paid for, nor allow any deduction from the price, unless authorized to do so by the principal (*i*);
- (9) if appointed to conduct a sale by the Court, to pay

(*a*) *Coles v. Trecothick*, 1804, 9 Ves. 234; 7 R. R. 167.

(*b*) *Ferrers v. Robbins*, 1835, 2 C. M. & R. 152; *Sykes v. Giles*, 1839, 5 M. & W. 645; 9 L. J. Ex. 106; 52 R. R. 870.

(*c*) *Franklyn v. Lamond*, 1847, 16 L. J. C. P. 221; 4 C. B. 637; 72 R. R. 671.

(*d*) *Hibbert v. Bayley*, 1860, 2 F. & F. 48.

(*e*) *Gray v. Gutteridge*, 1827, 3 C. & P. 40; 31 R. R. 343; *Yates v. Farebrother*, 1819, 4 Madd. 239; *Burrough v. Skinner*, 1770, 5 Burr. 2639.

(*f*) *Oliver v. Court*, 1820, Dan. 301; 22 R. R. 720.

(*g*) *Warlow v. Harrison*, 1858, 29 L. J. Q. B. 14; 1 El. & El. 295, 309; 117 R. R. 219, Ex. Ch.; *Bexwell v. Christie*, 1776, Cowp. 395.

(*h*) *Crosskey v. Mills*, 1834, 1 C. M. & R. 298; *Crowther v. Elgood*, 1887, 34 Ch. Div. 691; 56 L. J. Ch. 416, C. A.; *Parsons v. Dewsbury*, 1887, 3 T. L. R. 354, C. A.

(*i*) *Brown v. Staton*, 1816, 2 Chit. 353; 23 R. R. 750.

into Court, or to the solicitors of the vendors for payment into Court, any money received by him (*k*).

5.—*Solicitors.*

It is the duty of a solicitor—

- (1) to obey the express instructions of his client, notwithstanding counsel's advice to the contrary (*l*);
- (2) to give his clients the benefit of his personal superintendence and judgment (*m*);
- (3) to know and observe the rules of practice and procedure in the Courts (*n*);
- (4) to keep a record of his transactions with his clients (*o*);
- (5) to check useless litigation (*p*), and before instituting proceedings, especially on behalf of a wife against her husband, to carefully ascertain the facts of the case, and whether there is a reasonable prospect of success (*q*);
- (6) to communicate to his client any offers of compromise made to him in the course of conducting a suit (*r*);

(*k*) *Biggs v. Bree*, 1882, 51 L. J. Ch. 64, 263, C. A. ; *Brown v. Farebrother*, 1888, 58 L. J. Ch. 3.

(*l*) *Fray v. Voules*, 1859, 1 El. & El. 839 ; 28 L. J. Q. B. 232 ; 117 R. R. 483 ; *Butler v. Knight*, 1867, L. R. 2 Ex. 109 ; 36 L. J. Ex. 66.

(*m*) *Hopkinson v. Smith*, 1822, 1 Bing. 13 ; 25 R. R. 571.

(*n*) *Godefroy v. Dalton*, 1830, 6 Bing. 460 ; 31 R. R. 467.

(*o*) *Ex p. Swinbanks, Re Shanks*, 1879, 11 Ch. Div. 525 ; 48 L. J. Bkcy. 120, C. A.

(*p*) *Ottley v. Gilby*, 1845, 14 L. J. Ch. 177 ; 8 Beav. 602 ; 68 R. R. 218 ; *Re Clarke*, 1851, 21 L. J. Ch. 20 ; 1 De G. M. & G. 43 ; 91 R. R. 24.

(*q*) *Re Hooper, Baylis v. Watkins*, 1864, 33 L. J. Ch. 300 ; *Walker v. Walker*, 1897, 76 L. T. 234 ; *Beer v. Beer*, 1906, 22 T. L. R. 367.

(*r*) *Sill v. Thomas*, 1839, 8 C. & P. 762.



- (7) to keep secret all confidential communications made to him, and all information and knowledge of his client's affairs acquired by him, in the course of his employment as solicitor (s);
- (8) not to act for the opponent of his client, or of a former client, in any case in which his knowledge of the affairs of such client or former client will give him an undue advantage (t). An injunction will be granted to restrain a solicitor from communicating to the opponent of a former client confidential communications made to him, or documents or facts coming to his knowledge, as the solicitor of the former client (t); and when there is a chance of his using any such communications or knowledge to the detriment of the former client, from acting as solicitor for the opponent (t). In the application of this principle it is quite immaterial whether the solicitor was discharged by his former client, or ceased to act for him voluntarily (t);
- (9) to continue, until its termination, the conduct of any cause undertaken by him, unless there is good reason to abandon it (e.g., the failure of the client, after reasonable notice, to supply him

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(s) *Davies v. Clough*, 1836, 6 L. J. (N. S.) Ch. 113; 8 Sim. 262; 42 R. R. 171; *Biggs v. Head*, 1837, Sau. & Sc. 335; *Taylor v. Blacklow*, 1836, 3 Scott, 614; 43 R. R. 626.

(t) *Lewis v. Smith*, 1848, 1 Mac & G. 417; 84 R. R. 108; *Hutchins v. Hutchins*, 1825, 1 Hog. 315; 34 R. R. 234; *Davies v. Clough*, *supra*; *Cholmondeley v. Clinton*, 1815, 19 Ves. 261; 13 R. R. 183; *Biggs v. Head*, 1837, Sau. & Sc. 335, and cases reported in notes thereto. *Comp. Johnson v. Marriott*, 1833, 2 C. & M. 183; 39 R. R. 740; *Grissell v. Peto*, 1832, 9 Bing. 1; *Parratt v. Parratt*, 1848, 2 De G. & Sm. 258; 79 R. R. 204; *Hutchinson v. Newark*, 1850, 3 De G. & Sm. 727; 84 R. R. 415; *Robinson v. Mullett*, 1817, 4 Price, 353; 18 R. R. 723; *Rakusen v. Ellis*, (1912) 1 Ch. 831; 81 L. J. Ch. 409, C. A., overruling *Little v. Kingswood Collieries Co.*, 1882, 20 Ch. Div. 733; 51 L. J. Ch. 498.

- with funds for out of pocket expenses), and when there is such good reason, to give his client reasonable notice of his intention to abandon the cause (*u*);
- (10) not to bargain for nor accept any gift or reward from his client during the continuance of his employment, beyond the amount of his proper professional remuneration (*x*);
- (11) not to employ counsel, nor incur other unusual expenses, when the fees or expenses are not taxable as between party and party, without explaining to the client that such fees or expenses are not recoverable from the other side even in the event of success (*y*);
- (12) if he prepares a deed in which he takes a personal interest, to insert all the usual clauses and fully explain to the client the effect of the deed (*z*);
- (13) if he contracts with a client, to fully explain the transaction and make a full and fair disclosure of everything known to him respecting the subject-matter (*a*);

(*u*) *Nicholls v. Wilson*, 1843, 12 L. J. Ex. 266; 11 M. & W. 106; 63 R. R. 523; *Harris v. Osbourn*, 1834, 3 L. J. Ex. 182; 2 C. & M. 629; 39 R. R. 872; *Whitehead v. Lord*, 1852, 7 Ex. 691; 21 L. J. Ex. 239; 86 R. R. 797; *Van Sandau v. Browne*, 1832, 2 L. J. C. P. 34; 9 Bing. 402; 35 R. R. 571; *Hoby v. Built*, 1832, 1 L. J. K. B. 121; 3 B. & Ad. 350; 37 R. R. 444; *Wadsworth v. Marshall*, 1832, 2 C. & J. 665; 37 R. R. 810; *Underwood v. Lewis*, (1894) 2 Q. B. 306; 64 L. J. Q. B. 60, C. A. Article 67, Illustration 3.

(*x*) *O'Brien v. Lewis*, 1863, 32 L. J. Ch. 569. See Article 50, Illustration 12.

(*y*) *Foy v. Cooper*, 1842, 2 Q. B. 937; *Re Broad*, 1885, 15 Q. B. D. 420; 54 L. J. Q. B. 573, C. A.

(*z*) *Cockburn v. Edwards*, 1881, 18 Ch. Div. 449; 51 L. J. Ch. 46, C. A.; *Willis v. Barron*, (1902) A. C. 171; 71 L. J. Ch. 609, H. L. This principle applies also to counsel: *Segrave v. Kirwan*, 1828, Beat. 157.

(*a*) *Pisani v. Gibraltar*, 1874, L. R. 5 P. C. 516, P. C.; *Savery v.*

- (14) if he receives the deposit at a sale by auction, to pay it over to his client on demand, and not retain it as a stakeholder (*b*); unless, of course, the conditions of sale provide that he shall so retain it;
- (15) if he acts as the independent adviser of a person about to make a gift to, or voluntary settlement on, a person occupying a fiduciary position towards his client, to not merely satisfy himself that his client understands and desires to carry out the transaction, but also that the gift or settlement is one which it is right and proper, having regard to all the circumstances, for him to make; and if he is not so satisfied, to advise his client accordingly, and to refuse to act further in the transaction in the event of the client insisting, contrary to such advice, upon carrying it out (*c*). In such a case, the solicitor ought not to act for the donee as well as the donor (*c*).

*King*, 1856, 5 H. L. Cas. 627; 25 L. J. Ch. 482; 101 R. R. 299; *Ward v. Sharp*, 1883, 53 L. J. Ch. 313; *Luddy v. Peard*, 1886, 33 Ch. Div. 500; 55 L. J. Ch. 884; *Prees v. Coke*, 1871, L. R. 6 Ch. 645. And see Article 50, Illustrations 5, 6, 9 and 10.

(*b*) *Edgell v. Day*, 1865, L. R. 1 C. P. 80; 35 L. J. C. P. 7.

(*c*) *Powell v. Powell*, (1900) 1 Ch. 243; 69 L. J. Ch. 164; *Wright v. Carter*, (1903) 1 Ch. 27; 72 L. J. Ch. 138, C. A. And see *Willis v. Barron*, (1902) A. C. 171; 71 L. J. Ch. 609, H. L.

## CHAPTER IX.

## LIABILITIES OF AGENTS TO THEIR PRINCIPALS.

## Article 54.

IN RESPECT OF CONTRACTS ENTERED INTO ON BEHALF  
OF THE PRINCIPAL.

EXCEPT in the case of insurance brokers, who are, by usage, personally liable to the underwriters for premiums payable under policies effected by them (*a*), no agent incurs any personal liability to his principal in respect of any contract entered into by him on the principal's behalf, and in pursuance of his authority, unless he was acting under a *del credere* commission (*b*), or acted as agent for both parties, and so contracted a personal liability (*c*). An agent who contracts under a *del credere* commission is personally responsible to the principal for the due performance of the contract by the other contracting party (*d*).

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(*a*) *Baker v. Langhorn*, 1816, 6 Taunt. 519; 16 R. R. 662; *Lee v. Bullen*, 1858, 27 L. J. Q. B. 161; 8 El. & Bl. 692, n.

(*b*) *Varden v. Parker*, 1799, 2 Esp. 710; *Alson v. Sylvester*, 1823, 1 C. & P. 107; *Risbourg v. Bruckner*, 1858, 3 C. B. N. S. 812; 27 L. J. C. P. 90; 111 R. R. 846; Illustration 1.

(*c*) Article 115, Illustration 10.

(*d*) *Hornby v. Lacy*, 1817, 6 M. & S. 166; 18 R. R. 345; *Morris v. Cleasby*, 1816, 4 M. & S. 566; 14 R. R. 531.

*Illustration.*

A stockbroker sells shares to a jobber on the Stock Exchange, and does not disclose the name of the buyer in the contract note sent to the principal. The buyer fails. There is no rule or custom by which the broker in such a case is personally liable to the principal for the price of the shares or for the due performance of the contract, and the broker incurs no such liability (e).

*Note.*—*Right of set-off by insurance brokers.*—Where an insurance broker is sued by the trustee of a bankrupt underwriter for premiums due to the bankrupt, the broker has a right to set off the amount of any losses, or returns of premiums, due from the bankrupt in respect of any policy effected by the broker in his own name on behalf of his principal, provided that the broker, by reason of having acted under a *del credere* commission or otherwise, is personally interested in the payment of such losses or returns of premiums; because such transactions are mutual dealings within the meaning of the Bankruptcy Acts (f). But he has no right of set-off in respect of any policy effected in the name of the principal (g); nor in respect of any policy effected in his own name, unless he has a personal interest in the payment of the amount claimed to be set off (h).

(e) *Gill v. Shepherd*, 1902, 8 Com. Cas. 48.

(f) *Lee v. Bullen*, 1858, 8 El. & Bl. 692, n.; *Bize v. Dickason*, 1786, 1 T. R. 285; *Koster v. Eason*, 1813, 2 M. & S. 112; 14 R. R. 603; *Parker v. Beasley*, 1814, 2 M. & S. 423; 15 R. R. 299; *Davies v. Wilkinson*, 1828, 4 Bing. 573; 29 R. R. 634. Comp. *Elgood v. Harris*, (1896) 2 Q. B. 491; 66 L. J. Q. B. 53. There is no such right of set-off in an action by the representatives of a deceased underwriter: *Houstoun v. Robertson*, 1816, 6 Taunt. 448; 16 R. R. 655; *Houstoun v. Bordenave*, 1816, 6 Taunt. 451; 16 R. R. 657; *Beckwith v. Bullen*, 1858, 8 E. & B. 683; 27 L. J. Q. B. 162; 112 R. R. 728.

(g) *Koster v. Eason*, 1813, 2 M. & S. 112; 14 R. R. 603; *Peele v. Northcote*, 1817, 7 Taunt. 478; 18 R. R. 549.

(h) *Minett v. Forrester*, 1811, 4 Taunt. 541; 13 R. R. 676; *Parker v. Smith*, 1812, 16 East. 382; 14 R. R. 366; *Goldschmidt v. Lyon*,

It was laid down by Lord Mansfield in *Grove v. Dubois*, 1 T. R. 112, that an agent who sold goods under a *del credere* commission was liable in the first instance to the principal for the price, but it is now settled that such an agent is in the position of a surety, and only becomes liable on the purchaser's default (*i*).

### Article 55.

#### LIABILITY ON BILLS OF EXCHANGE SIGNED WITHOUT QUALIFICATION.

Where an agent, in the course of the agency, signs a bill of exchange in his own name, without qualification, as drawer or indorser, and the principal becomes the holder of the bill, the question whether the agent is personally liable to the principal on the bill depends upon what was the real intention of the parties. If the agent intended to bind himself, or if, by signing without qualification, he led the principal to believe that such was his intention, and to act in a way in which he would not have acted but for such belief, the agent is liable to the principal on the bill. Otherwise, he is not so liable (*k*).

Thus, where a broker, who had no authority to draw bills on behalf of the principal, was employed to sell goods, and

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1812, 4 Taunt. 534; 13 R. R. 670; *Baker v. Langhorn*, 1816, 6 Taunt. 519; 16 R. R. 662.

(*i*) See note (*d*), *ante*, p. 164.

(*k*) *Castrique v. Buttigieg*, 1855, 10 Moo. P. C. C. 94; 110 R. R. 2, P. C.; *Goupy v. Harden*, 1816, 2 Marsh. 454; 17 R. R. 478; *Le Feuvre v. Lloyd*, 1814, 1 Marsh. 318; 15 R. R. 644; *Kidson v. Dilworth*, 1818, 5 Price, 564; 19 R. R. 656.

sold them for a bill at a given date, and drew on the purchaser for the amount, he was held liable to the principal on the bill, on the ground that his signature, as drawer, might have misled the principal and prevented him from making inquiries as to the solvency of the purchaser (*l*). So, if an agent who is instructed to purchase foreign bills for his principal, indorses such bills, intending to guarantee them, or indorses and sends his own bills in execution of the order, he is liable to the principal on the indorsement (*l*). But, where it is not intended that the agent shall be bound, the mere fact that he signs a bill without qualification does not render him liable to the principal, but only to third persons who become holders thereof in due course (*l*).

### Article 56.

#### LIABILITY FOR NEGLIGENCE AND OTHER BREACHES OF DUTY.

Except in the case of counsel, who are under no liability to their clients for negligence or other breaches of duty in the course of their employment as such (*m*), every agent is liable to make good any legal damage suffered by his principal as a natural and probable consequence of the agent's negligence or other breach of duty in the course of the agency (*n*).

(*l*) See note (*k*), *supra*.

(*m*) *Fell v. Brown*, 1791, 1 Peake, 131; 3 R. R. 663; *Mulligan v. M'Donagh*, 1860, 2 L. T. 136.

(*n*) See Illustrations and Article 140, Illustration 2. The Statute of Limitations runs in favour of the agent from the time of the act or omission constituting the breach of duty. *Wood v. Jones*, 1889, 61 L. T. 551; *Bean v. Wade*, 1885, 2 T. L. R. 157, C. A.; *Smith v. Fox*, 1848, 6 Hare, 386; 77 R. R. 152; *Howell v. Young*, 1826, 5 B. & C.

Provided that—

- (a) where an agent is clearly authorized to do any particular act, or to effect any particular transaction, he is not liable to the principal for any loss or injury suffered in consequence of the imprudent or improper nature of that act or transaction (*o*);
- (b) where an agent strictly follows the instructions of the principal (*p*), or, in the absence of express instructions, acts in accordance with usage and in the ordinary course of business (*q*), or upon the best advice he can obtain under the circumstances (*r*), or uses his best judgment in a matter of pure discretion (*s*), he is not liable to the principal for loss or injury resulting therefrom.

In this Article, negligence means the neglect or

259; 29 R. R. 237; *Short v. M'Carthy*, 1820, 3 B. & A. 626; 22 R. R. 503.

(*o*) Illustration 17.

(*p*) *Pariete v. Lubbock*, 1855, 8 De G. M. & G. 5; 114 R. R. 1; *Warwicke v. Noakes*, 1790, 1 Peake, 98; 3 R. R. 653.

(*q*) *Russell v. Hankey*, 1794, 6 T. R. 12; 3 R. R. 102; *Lambert v. Heath*, 1846, 15 M. & W. 486; 71 R. R. 738; *Moore v. Mourgue*, 1776, Cowp. 479; *Nitrate Producers' S. S. Co. v. Wills*, 1905, 21 T. L. R. 699, H. L. Illustrations 9, 10 and 16.

(*r*) *Miles v. Bernard*, 1795, 2 Peake, 61.

(*s*) *Comber v. Anderson*, 1808, 1 Camp. 523; *Cullerne v. L. & S. Building Society*, 1890, 25 Q. B. D. 485; 59 L. J. Q. B. 525, C. A.; *Chown v. Parrott*, 1863, 14 C. B. N. S. 74; 32 L. J. C. P. 197; *In re Cobridge S. S. Co. and Bucknall S. S. Lines*, 1910, 15 Com. Cas. 138, C. A.



omission by an agent to exercise such a degree of skill, care and diligence as it is his duty to exercise, *t*).

### *Illustrations.*

#### *Disobedience to instructions.*

1. A solicitor enters into a compromise on behalf of his client, notwithstanding express instructions from the client not to do so. He is liable to the client for damages, though the compromise was reasonable, and was entered into in good faith for the benefit of the client, and on the advice of the counsel engaged in the case (*u*).

2. An agent was instructed, and undertook, to warehouse certain goods at a particular place. He warehoused a portion of such goods at another place, where they were destroyed without negligence. Held, that the loss of the goods was a natural consequence of the agent's disobedience to instructions, and that he was liable to the principal for their value (*x*).

3. An agent is instructed to insure certain goods, which he neglects to do. He is liable to the principal for the value of the goods, in the event of their being lost (*y*).

4. An outside broker was employed to buy shares on the Stock Exchange. He accepted the employment, and sent a bought note, but did not actually buy the shares. Held, that it was not a wagering contract, and that he was liable to pay damages for breach of duty (*z*).

(*t*) See Article 45, and Illustrations thereto. See also Illustrations 8, 10, 16 and 21. As to negligence of solicitors, see *post*, p. 176.

(*u*) *Butler v. Knight*, 1867, L. R. 2 Ex. 109; 36 L. J. Ex. 66; *Fray v. Voules*, 1859, 1 El. & El. 839; 28 L. J. Q. B. 232; 117 R. R. 483.

(*x*) *Lilley v. Doubleday*, 1881, 7 Q. B. D. 510; 51 L. J. Q. B. 310, C. A.

(*y*) *Smith v. Lascelles*, 1788, 2 T. R. 187; 1 R. R. 457.

(*z*) *Re Hewett, Ex p. Paddon*, 1893, 9 T. L. R. 166, C. A.

*Negligence and other breaches of duty.*

5. An agent pays his principal's money into his own account at the bank, it being his duty to pay it into a separate account. He is responsible for the failure of the banker, though acting gratuitously (*a*).

6. A broker was authorized to sell and deliver certain goods. He contracted to sell them for cash on delivery. It then became his duty not to deliver the goods without payment. Held, that he was liable to the principal in damages for having delivered the goods without payment (*b*).

7. A broker is authorized to sell goods at a certain price. He sells them at a lower price. He is liable to the principal in damages for the breach of duty (*c*). So, a broker who sold goods by auction at much below their real value, not having made an estimate of the value in accordance with usage, was held liable in an action for negligence (*d*). But an auctioneer is not liable to his principal for accepting the highest *bonâ fide* bid at a sale without reserve, in opposition to the principal's express instructions, because such instructions are unlawful, and it is not his duty to obey them (*e*).

8. An auctioneer takes a bill of exchange in payment of the price of goods sold by him. He is liable to the principal for the amount, if the bill be dishonoured (*f*). So, where a house agent, who was instructed by a lessor not to part with a written licence (authorizing an assignment of the lease) until the lessee had paid the rent due, accepted a cheque for

(*a*) *Wren v. Kirton*, 1805, 11 Ves. 377; 8 R. R. 174; *Massey v. Banner*, 1820, 1 Jac. & W. 241; 21 R. R. 150; *Robinson v. Ward*, 1825, 2 C. & P. 59; *MacDonnell v. Harding*, 1834, 4 L. J. Ch. 10; 7 Sim. 178; 40 R. R. 95.

(*b*) *Boorman v. Brown*, 1842, 3 Q. B. 511; 11 C. & F. 1; 61 R. R. 287. And see *Kidd v. Horne*, 1885, 2 T. L. R. 141.

(*c*) *Dufresne v. Hutchinson*, 1810, 3 Taunt. 117.

(*d*) *Solomon v. Barker*, 1862, 2 F. & F. 726.

(*e*) *Berwell v. Christie*, 1776, Cowp. 395.

(*f*) *Ferrers v. Robbins*, 1835, 2 C. M. & R. 152.

the rent and gave up the licence to the lessee, and the cheque was dishonoured, the agent was held liable to the lessor for the full amount of the rent (*g*).

9. A London banker receives bills from a correspondent in the country, to be presented for payment. He gives up the bills to the acceptor, in exchange for a cheque for the amount, that being the usual and ordinary course amongst bankers. The cheque is dishonoured. The banker is not liable in an action for negligence, having acted in the ordinary course of business and in accordance with usage (*h*).

10. A. contracted to lighter and load certain machinery, and pass it through the Custom House. It was common knowledge that import duties were about to be imposed on machinery, and A. might have cleared it in time to escape the taxation, but did not do so, though he cleared it within the time prescribed by the Customs regulations. In an action against A. for the amount of the duty paid, it was held that there was no evidence to go to the jury of any negligence or breach of duty for which he would be liable (*i*).

11. The directors of a company knowingly or negligently (*j*) pay dividends out of the capital. Such a payment is a misapplication of the funds of the company, and the directors are jointly and severally liable to repay the amount to the company, with interest (*k*). But they are not liable if the dividends were paid in reliance on information fur-

(*g*) *Papé v. Westacott*, (1894) 1 Q. B. 272; 63 L. J. Q. B. 222, C. A.

(*h*) *Russell v. Hankey*, 1794, 6 T. R. 12; 3 R. R. 102; *Wilts and Dorset Bank v. Cook*, 1889, 5 T. L. R. 703. *Comp. Bank of Scotland v. Dominion Bank*, (1891) A. C. 592, H. L. Sc.

(*i*) *Commonwealth Portland Cement Co. v. Weber*, (1905) A. C. 66; 74 L. J. P. C. 25, P. C.

(*j*) See *Dovey v. Cory*, (1901) A. C. 477; 70 L. J. Ch. 753, H. L.; *Lucas v. Fitzgerald*, 1904, 20 T. L. R. 16.

(*k*) *Re Oxford Building Society*, 1886, 35 Ch. D. 502; 56 L. J. Ch. 98; *Flitcroft's case*, 1882, 21 Ch. D. 519; 52 L. J. Ch. 217, C. A.; *Re Bennett*, 1892, 8 T. L. R. 194, C. A.; *Leeds Estate Co. v. Shepherd*, 1887, 36 Ch. D. 787; 57 L. J. Ch. 46. As to the liability of shareholders receiving the dividends, see *Moxham v. Grant*, (1900) 1 Q. B. 88; 69 L. J. Q. B. 97, C. A.; *Towers v. African Tug Co.*, (1904) 1 Ch.

nished by the officials of the company, on which in the ordinary course of business the directors were entitled to rely (*l*).

12. A solicitor, employed to procure a mortgage, discovers a defect in his client's title, which he afterwards discloses to another client, causing damage to the first-mentioned client. He is liable for the damage caused by his breach of duty (*m*). So, where a solicitor without reasonable cause, or without giving his client reasonable notice of his intention to do so, abandons the prosecution or defence of an action, he is liable to the client for any loss occasioned thereby (*n*).

13. A shipmaster signs a bill of lading which is incorrectly dated. He is liable to his principals in an action for negligence (*o*).

14. An auctioneer sells property under conditions requiring the payment of an immediate deposit. He is liable in an action for negligence, if he permits the highest bidder to go away without paying the deposit (*p*).

15. An auctioneer, having sold property, rescinds the contract of sale without the authority of the vendor. He is liable to the vendor for damages (*q*).

16. An insurance broker was employed to insure certain goods from a particular point in the voyage. He insured them "at and from that point, beginning the adventure from the loading thereof on board." Held, that he had been guilty of negligence, for the consequences of which he was liable to his principal (*r*). Actions for negligence against

558; 73 L. J. Ch. 395, C. A.; *Lucas v. Fitzgerald*, 1904, 20 T. L. R. 16.

(*l*) See note (*j*), p. 171.

(*m*) *Taylor v. Blacklow*, 1836, 3 Scott, 614; 43 R. R. 626. See also *Barber v. Stone*, 1881, 50 L. J. Q. B. 297.

(*n*) *Hoby v. Buitt*, 1832, 3 B. & Ad. 350; 37 R. R. 444.

(*o*) *Stumore v. Breen*, 1886, 12 A. C. 698; 56 L. J. Q. B. 401, H. L.

(*p*) *Hibbert v. Bayley*, 1860, 2 F. & F. 48.

(*q*) *Nelson v. Aldridge*, 1818, 2 Stark. 435; 20 R. R. 709.

(*r*) *Park v. Hammond*, 1816, 6 Taunt. 495; 16 R. R. 658. See also *Dickson v. Devitt*, 1916, 86 L. J. K. B. 315.

insurance brokers have also been held to lie—(a) for not effecting a policy within a reasonable time (*s*); (b) for an omission to insert a clause usually inserted when insuring from the particular point (*t*); and (c) for an omission to communicate a material letter to the underwriters, in consequence of which the principal failed in an action on the policy (*u*). But, where a broker acts in good faith and in accordance with usage in effecting a policy, the mere fact that the insurance might possibly have been effected on better terms is not sufficient to render the broker liable to the principal for damages. To render him liable, it must appear that he has been guilty of negligence or of some breach of duty (*x*).

17. The directors of a limited company, whose object was to purchase a certain business, were authorized by the articles of association "to purchase or acquire the said business as it then stood, upon such terms and under such stipulations as might be agreed upon." Held, that the directors were not liable, in the absence of proved gross negligence on their part, for the consequences of so carrying out the object of the company, the business, in fact, being in a state of insolvency at the time, they being clearly authorized to purchase the business as it stood, which was an act in itself imprudent (*y*). Nor are directors liable for mere mistakes or errors of judgment, provided they act honestly and within their powers, and exercise such care and skill as may reasonably be expected, having regard to their knowledge and experience (*z*); and they are entitled to rely upon informa-

(*s*) *Turpin v. Bilton*, 1843, 5 M. & G. 455; 12 L. J. C. P. 167.

(*t*) *Mallough v. Barber*, 1815, 4 Camp. 150.

(*u*) *Maydew v. Forrester*, 1814, 5 Taunt. 615; 15 R. R. 597.

(*x*) *Moore v. Mourgue*, 1776, Cowp. 479; *Comber v. Anderson*, 1808, 1 Camp. 523. And see *Nitrate Producers' Co. v. Wills*, 1905, 21 T. L. R. 699, H. L.

(*y*) *Overend v. Gibb*, 1872, L. R. 5 H. L. 480; 42 L. J. Ch. 67, H. L.

(*z*) *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*, (1899) 2 Ch. 392; 68 L. J. Ch. 699, C. A.

tion furnished by the officials of the company, unless there are grounds for suspecting such information to be false, with respect to matters with which it is the duty of such officials to be acquainted (a).

18. *Damage must not be too remote.*—Certain bankers who were employed to receive the dividends on certain shares for a customer, and who charged him commission for keeping the account, negligently allowed their manager to have the key of the safe where the certificates of the shares were kept. The manager fraudulently sold the shares, and forged the customer's name to a transfer thereof. Held, that although the bankers would have been liable to the customer for any loss occasioned to him as a natural and probable consequence of their negligence, the costs of an action to recover the shares from the transferee were too remote a consequence, for which they were not liable (b).

19. *Damage must be legal damage.*—A. employs B., a turf commission agent, to make bets on his behalf. B. undertakes the commission, and neglects to make the bets. A. has suffered no legal damage, because the bets would have been void, and A. would not have been able to recover them by action, even if B. had duly made them on his behalf. A. therefore cannot maintain an action against B. for breach of duty, though it may be customary to pay such debts without action (c). So, where an agent who was instructed to insure certain slaves neglected to do so, it was held that he was not liable to his principal in an action for negligence, although it was customary for underwriters to pay in respect of such a policy, because, by reason of its ille-

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(a) *Dovey v. Cory*, (1901) A. C. 477; 70 L. J. Ch. 753, H. L.; *Préfontaine v. Grenier*, (1907) A. C. 101; 76 L. J. P. C. 4, P. C.

(b) *In re United Service Co., Johnston's claim*, 1870, L. R. 6 Ch. 212; 40 L. J. Ch. 286; *Cullerne v. L. & S. Building Society*, 1890, 25 Q. B. D. 485; 59 L. J. Q. B. 525, C. A.

(c) *Cohen v. Kittell*, 1889, 22 Q. B. D. 680; 58 L. J. Q. B. 241.

gality, the principal would have been unable to recover upon the policy at law (*d*).

20. *Nominal damages, though no actual loss.*—An agent is instructed to present a bill for acceptance. He neglects to do so. The principal is entitled to recover nominal damages for the breach of duty, though he suffered no actual loss thereby, the bill having been paid by other parties thereto. In such a case legal damage is presumed (*e*).

21. *Negligence of gratuitous agent.*—A customer deposited certain securities with his bankers for safe keeping, the bankers receiving no reward for taking care of them. The securities were stolen by a clerk in the bankers' employ. Held, that the bankers, having acted gratuitously, were not liable, there being no evidence of gross negligence on their part (*f*). A gratuitous agent is liable for gross negligence in the course of the agency (*g*); but not for mere want of skill (*h*), unless he is in a situation from which skill may be implied (*i*). But an omission to exercise such skill as he actually possesses, or has held himself out to possess, or such skill as may reasonably be implied from his profession or employment, or to exercise such care and diligence as he is in the habit of exercising in regard to his own affairs,

(*d*) *Webster v. De Tastet*, 1797, 7 T. R. 157; 4 R. R. 402. See also *Duncan v. Skipwith*, 1809, 2 Camp. 68; *Weld-Blundell v. Stephens*, 1918, 34 T. L. R. 564.

(*e*) *Van Wart v. Woolley*, 1830, M. & M. 520.

(*f*) *Giblin v. McMullen*, 1869, L. R. 2 P. C. 317; 38 L. J. P. C. 25, P. C.; *Bullen v. Swan Electric Engraving Co.*, 1907, 23 T. L. R. 258, C. A. Comp. *Re United Service Co., Johnston's claim*, 1870, L. R. 6 Ch. 212; 40 L. J. Ch. 286.

(*g*) *Elsee v. Gatward*, 1793, 5 T. R. 143; *Wilkinson v. Coverdale*, 1793, 1 Esp. 75; 53 R. R. 256; *Beauchamp v. Powley*, 1831, 1 M. & Rob. 38; *Doorman v. Jenkins*, 1834, 4 L. J. K. B. 29; 2 A. & E. 256; 44 R. R. 429.

(*h*) *Moffatt v. Bateman*, 1869, L. R. 3 P. C. 115, P. C.

(*i*) *Shiells v. Blackburne*, 1789, 1 H. Bl. 159; 2 R. R. 750.

is deemed to be gross negligence, for the consequences of which he is responsible to the principal (*k*).

*Liability of Solicitors for Negligence.*

A solicitor is not liable to his client for negligence in the performance of his duties as such, unless he has been guilty of gross negligence or gross ignorance (*l*). Where, however, there is any evidence at all of negligence, the question whether there has been gross negligence or not ought to be submitted to the jury (*m*). A lessee consulted a solicitor in reference to the building of a certain wall, to the erection of which the lessor objected. The lease was shown to the solicitor, who, without making any inquiry as to whether there was any obstacle other than such as might be ascertained from the lease, advised that the lessee might build the wall, there being, in fact, a restrictive covenant in favour of the original vendors. Held, that there was no evidence of negligence for the jury (*n*). So, a solicitor is not liable merely because he has made a mistake, or has given his client erroneous or bad advice (*o*); or has misinterpreted a rule of Court, the meaning of which is obscure (*p*). Nor

(*k*) *Wilson v. Brett*, 1843, 11 M. & W. 113; 12 L. J. Ex. 264; 63 R. R. 528; *Dartnall v. Howard*, 1825, 4 B. & C. 345; *Whitehead v. Greetham*, 1825, 2 Bing. 464, Ex. Ch.; *Donaldson v. Haldane*, 1840, 7 C. & F. 762; 51 R. R. 79, H. L.

(*l*) *Purves v. Landell*, 1845, 12 C. & F. 91; 69 R. R. 46, H. L.; *Chapman v. Van Toll*, *Van Toll v. Chapman*, 1857, 27 L. J. Q. B. 1; 8 E. & B. 396; 112 R. R. 619; *Dooby v. Watson*, 1888, 39 Ch. Div. 178; 57 L. J. Ch. 865; *Lowry v. Guilford*, 1832, 5 C. & P. 234; 38 R. R. 818; *Pitt v. Yalden*, 4 Burr. 2060.

(*m*) *Ireson v. Pearman*, 1825, 3 L. J. K. B. 119; 3 B. & C. 799; 27 R. R. 490.

(*n*) *Pitman v. Francis*, 1884, 1 C. & E. 355.

(*o*) *Purves v. Landell*, 1845, 12 C. & F. 91; 69 R. R. 46, H. L.; *Barker v. Fleetwood*, 1890, 6 T. L. R. 430, C. A.; *Faithfull v. Kesteven*, 1910, 103 L. T. 56, C. A.

(*p*) *Laidler v. Elliott*, 1825, 3 B. & C. 738; *Bulmer v. Gilman*, 1842, 4 M. & G. 108; 61 R. R. 487.



is he liable for an error of judgment upon a point of new occurrence, or of nice or doubtful construction, or in respect of a matter such as is usually intrusted to counsel (*q*). But he is liable for the consequences of his ignorance or non-observance of the rules of practice; for want of reasonable care in the preparation of a cause for trial, or for neglecting to attend at the trial with his witnesses; or for the mismanagement of so much of the cause as is usually intrusted to his department (*q*). Thus, where a solicitor was employed to take proceedings against certain apprentices for misconduct; and proceeded on the section of the statute relating to servants, he was held liable for the damages and costs incurred by reason of the error (*r*). So, where a solicitor allowed a case to be called on without ascertaining whether a material witness, whom his client had promised to bring, was in court, it was held that there was sufficient evidence of want of reasonable care to go to the jury (*s*). Where a solicitor allowed judgment to go against his client by default, it was held that the solicitor must show that there was no defence, in order to rebut the inference of negligence, and that it was not necessary for the client to prove that he had a good defence (*t*). Solicitors have been held liable in actions for negligence—(1) for lending money on insufficient security (*u*); (2) for omitting to give due notice of an assignment of a chose in action (*x*); (3) for omitting

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(*q*) *Godefroy v. Dalton*, 1830, 6 Bing. 460; 31 R. R. 467; *Kemp v. Burt*, 1833, 2 L. J. K. B. 69; 4 B. & Ad. 424; 38 R. R. 278; *Hawkins v. Harwood*, 1849, 4 Ex. 503; *De Rouffigny v. Peale*, 1811, 3 Taunt. 484; 12 R. R. 687.

(*r*) *Hart v. Frame*, 1839, 6 Cl. & F. 193; 49 R. R. 88, H. L.

(*s*) *Reece v. Rigby*, 1821, 4 B. & A. 202; 23 R. R. 251.

(*t*) *Godefroy v. Jay*, 1831, 7 Bing. 413; 33 R. R. 528.

(*u*) *In re Partington, Partington v. Allen*, 1887, 57 L. T. 654; *Pretty v. Fowke*, 1887, 3 T. L. R. 845; *Craig v. Watson*, 1845, 8 Beav. 427; 68 R. R. 138. See also *Nocton v. Ashburton*, (1914) A. C. 932; 83 L. J. Ch. 784, H. L.

(*x*) *Bean v. Wade*, 1885, 2 T. L. R. 157, C. A.; *Donaldson v. Haldane*, 1840, 7 C. & F. 762; 51 R. R. 79, H. L.

to make proper inquiries and searches in an investigation of title (*y*); (4) for suing where the Court had no jurisdiction (*z*); (5) for not duly filing certain writs, in accordance with the practice of the Court (*a*); (6) for not using due diligence to obtain satisfaction of a judgment (*b*); (7) for investing trust moneys in improper securities (*c*); (8) for omitting to procure the investment of the proceeds of property sold by order of the Court (*d*); (9) for not explaining the effect of an unusual covenant in a deed executed by a client (*e*); and (10) for missing a case which had been transferred to another judge, without the solicitor's knowledge, by order of the Lord Chancellor (*f*). If property comes to a solicitor in consequence of his ignorance, or of a breach of duty on his part, he is a trustee thereof for the persons who would have been entitled if he had known and done his duty. No solicitor is permitted to take advantage of his own ignorance or breach of duty (*g*).

### Article 57.

#### MEASURE OF DAMAGES FOR NEGLIGENCE OR OTHER BREACH OF DUTY.

The measure of damages in an action by a principal against his agent for negligence or any other

(*y*) *Cooper v. Stephenson*, 1852, 21 L. J. Q. B. 292; 91 R. R. 879; *Allen v. Clark*, 1863, 7 L. T. 781.

(*z*) *Williams v. Gibbs*, 1836, 5 Ad. & E. 208; 44 R. R. 404.

*a*) *Hunter v. Caldwell*, 1847, 10 Q. B. 69, 83; 16 L. J. Q. B. 274; 74 R. R. 203, Ex. Ch.

(*b*) *Russell v. Palmer*, 1767, 2 Wils. 325.

(*c*) *Blyth v. Fladgate*, *Morgan v. Blyth*, *Smith v. Blyth*, (1891) 1 Ch. 337; 60 L. J. Ch. 66.

(*d*) *Batten v. Wedgwood Coal Co.*, 1886, 2 T. L. R. 236.

(*e*) *Stannard v. Ullithorne*, 1834, 3 L. J. C. P. 307; 10 Bing. 491; 38 R. R. 518.

(*f*) *Burgoine v. Taylor*, 1878, 9 Ch. Div. 1; 47 L. J. Ch. 542, C. A.

(*g*) *Bulkley v. Wilford*, 1834, 2 Cl. & F. 102; 37 R. R. 39, H. L.

breach of duty by the agent in the course of the agency is the loss actually sustained by the principal, being such loss as in the ordinary course of things would naturally result, or such as, under the particular circumstances, the agent might reasonably have expected to result from such negligence or breach of duty (*h*).

*Illustrations.*

1. A commission agent in Hong Kong was instructed to purchase a quantity of a certain kind of opium. He purchased and shipped to his principal opium of an inferior kind. Held, that the proper measure of damages was the loss actually sustained by the principal in consequence of the opium not being of the description ordered, and not the difference between the value of the description ordered and of that shipped (*i*).

2. An agent is instructed to insure his principal's goods, and wilfully or negligently omits to do so. He is liable to the same extent as the underwriters would have been if the goods had been duly insured (*k*).

3. An insurance broker, in effecting a policy, omitted to disclose a material letter, in consequence of which his prin-

(*h*) *In re United Service Co., Johnston's claim*, 1870; L. R. 6 Ch. 212; 40 L. J. Ch. 286; *Cassaboglou v. Gibb*, 1882, 11 Q. B. D. 797; 52 L. J. Q. B. 538, C. A.; *Salveson v. Rederi Aktiebolaget Nordstjernam*, (1905) A. C. 302; 74 L. J. P. C. 96, H. L.; *Fisher v. Val de Travers Co.*, 1876, 45 L. J. C. P. 479; 1 C. P. D. 511; *Hadley v. Baxendale*, 1854, 9 Ex. 341; 23 L. J. Ex. 182; 96 R. R. 742; *Bertram v. Godfray*, 1830, 1 Knapp, 381, P. C.; *Becker v. Medd*, 1897, 13 T. L. R. 313, C. A.; *Johnston v. Braham*, (1917) 1 K. B. 586; 86 L. J. K. B. 613, C. A. And see Illustration, and Article 56, Illustration 8.

(*i*) *Cassaboglou v. Gibb*, 1882, 11 Q. B. D. 797; 52 L. J. Q. B. 538, C. A.

(*k*) *Smith v. Price*, 1862, 2 F. & F. 748; *Tickel v. Short*, 1750, 2 Ves. 238.

principal failed in an action against some of the underwriters on the policy, and was compelled to make restitution to others who had paid their shares of the loss without action. Held, that the broker was liable for the actual loss sustained by the principal in consequence of the omission, including the amounts so repaid to the underwriters (*l*).

4. A. employs B. to buy tobacco of the best quality. B. delegates his employment to C., who buys an inferior quality. A. recovers damages from B. for the breach of duty. B. is entitled to recover from C. the full amount of the damages and costs incurred by him in the action by A. (*m*).

5. A solicitor, who was employed to effect a mortgage on a piece of land, neglected to ascertain that a third person had an equitable charge thereon to the extent of 4*l*. The mortgagee was compelled to pay the amount of the charge, on a sale of the property, to enable him to convey it to the purchaser. Held, that 4*l*. was the proper measure of damages for the negligence, in the absence of evidence reducing the amount (*n*).

6. A stockbroker, employed to sell joint stock bank shares, omitted to insert in the contract the number of the shares, or the name of the registered proprietor thereof, as required by Leeman's Act, the omission rendering the contract void. Held, that the principal was entitled to recover, as damages for the breach of duty, the amount he would have obtained for the shares if they had been validly sold (*o*).

7. An agent was instructed not to part with the possession or control of certain goods until they were paid for. He parted with them, and the purchaser failed to pay the price. Held, that the measure of damages was the value of the

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(*l*) *Maydew v. Forrester*, 1814, 5 Taunt. 615; 15 R. R. 597.

(*m*) *Mainwaring v. Brandon*, 1818, 2 Moore, 125; 19 R. R. 497.

(*n*) *Whiteman v. Hawkins*, 1878, 4 C. P. D. 13.

(*o*) *Neilson v. James*, 1882, 9 Q. B. D. 546; 51 L. J. Q. B. 369, C. A.

goods, which the principal had lost in consequence of the breach of duty (*p*).

8. An agent, acting under a power of attorney, wrongfully transferred to himself certain shares belonging to his principal, in satisfaction of a claim which the principal partly admitted and partly disputed. Held, that the principal was entitled to recover the full value of the shares (*q*).

9. Directors of a company wrongfully allotted shares to themselves at an undervalue. It was held that they must account to the company for profits obtained in respect of the shares they had disposed of, and as to those which they retained, that they were liable to pay by way of damages in respect of the wrongful allotment the difference between the price at which the shares were allotted and their highest market value taken as a whole during the time they held them, which under the circumstances was the market value at the time of the allotment, but that the damage must not be measured by their value if sold in small lots at different times (*r*).

10. An agent, being instructed to buy certain stock, sells stock of his own to the principal, fraudulently representing that it belongs to third persons. The principal holds the stock for some months after discovering the circumstances, and then resells. The measure of damages for the breach of duty is the difference between the price paid by the principal and the price at which he could have resold at the time when he discovered the fraud, and not the loss ultimately sustained by him (*s*).

11. A stockbroker, having agreed to carry over certain shares to the next settlement, and having made the necessary arrangements with a jobber for that purpose, wrongfully closed the account by selling the shares without the princi-

(*p*) *Stearine Co. v. Heintzmann*, 1864, 17 C. B. N. S. 56.

(*q*) *Dantra v. Stiebel*, 1863, 3 F. & F. 951.

(*r*) *Shaw v. Holland*, (1900) 2 Ch. 305; 69 L. J. Ch. 621, C. A.

(*s*) *Waddell v. Blochey*, 1879, 4 Q. B. D. 678; 48 L. J. Q. B. 517.

pal's instructions, and the principal gave him notice that he would insist upon performance on settling day. When the shares were sold prices were falling, but they rose again and were higher on settling day than at the time of the sale, having been still higher in the meantime. It was held that the principal was entitled to insist upon performance on settling day, and to measure the damages with reference to the prices on that day (*t*). Whether he could have claimed to assess the damages on the basis of the highest prices between the time of the sale and settling day, *quære* (*t*).

12. A banker wrongfully dishonours the cheque of a trading customer. The jury are entitled to award substantial damages without proof of special or actual damage (*u*).

13. A. pays 400*l.* to his bankers for the specific purpose of providing for a certain bill, he being then indebted to them in a larger amount. The bankers place the amount to his credit, and dishonour the bill. A. becomes bankrupt. The trustee in bankruptcy is entitled to recover from the bankers, as damages for the breach of duty, the full amount of the bill (*x*).

14. An agent wrongfully abandoned his agency. Held, that the jury were entitled to award compensation for loss of business in consequence of injury done to the principal's credit, and loss in consequence of the suspension of the business, because, although such losses might not arise naturally in the ordinary course of things, they were such as, under the circumstances, the agent might reasonably have expected to result as a consequence of the breach of duty (*y*).

(*t*) *Michael v. Hart*, (1902) 1 K. B. 482; 71 L. J. K. B. 265, C. A.

(*u*) *Rolin v. Steward*, 1854, 23 L. J. C. P. 148; 14 C. B. 595; 98 R. R. 774.

(*x*) *Hill v. Smith*, 1844, 13 L. J. Ex. 243; 12 M. & W. 618; 67 R. R. 436.

(*y*) *Boyd v. Fitt*, 1864, 11 L. T. 280.

## Article 58.

## LIABILITY OF AGENTS ACCEPTING BRIBES.

Where an agent accepts any money or property in the course of his agency by way of a bribe, he is liable to account for the money, or for the highest value of the property while in his possession, and to pay over the amount as money received to the use of the principal, with interest at the rate of five per cent. per annum from the date of the receipt of the bribe; and if he has been induced by the bribe to depart from his duty to the principal, he is also liable, jointly and severally with the person who bribed him, to make good any loss suffered by the principal in consequence of such departure from duty, without taking into consideration the amount of the bribe so accounted for or paid over to the principal (z), and to forfeit any commission or remuneration which would otherwise have been payable to him (a).

The claim of a principal in respect of a bribe received by his agent is barred by the Statute of Limitations, in equity as well as at law, after the

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(z) *Mayor of Salford v. Lever*, (1891) 1 Q. B. 168; 60 L. J. Q. B. 39, C. A.; *Morgan v. Elford*, 1876, 4 Ch. Div. 352; *Phosphate Sewage Co. v. Hartmont*, 1877, 5 Ch. Div. 394, 448, C. A.; *Cohen v. Kushke*, 1900, 83 L. T. 102; *E. I. Co. v. Henchman*, 1791, 1 Ves. jun. 289. And see Illustrations. As to the criminal liability of an agent who accepts a bribe, see *Reg. v. Barber*, 1887, 3 T. L. R. 491; 6 Edw. 7, c. 34 (Appendix).

(a) See Article 67, Illustration 5.

expiration of six years from the time when the principal became aware of the bribery (b).

The principal is justified in dismissing without notice any agent who accepts a bribe in the course of his agency (c).

### *Illustrations.*

1. An agent, in consideration of a bribe, induces his principal to contract with the person bribing him. The principal is entitled to recover from the agent the amount of the bribe, as money received to his use, and from the agent and the person bribing him, jointly and severally, any loss incurred through having been so induced to contract (d).

2. A director of a company, who was a shareholder in two other companies, accepted bonuses from such other companies, in consideration of his giving them orders for goods on behalf of the first-mentioned company. The articles of association provided that the directors might contract with the company. Held, that the bonuses were bribes, and that the director must account to the company for them, with interest. Held, further, that the bribery justified the dismissal of the director, though the bribery was not discovered until after the dismissal, and had taken place several months prior thereto (c).

3. The secretary of a company, when making a contract on behalf of the company with the vendor, stipulated that he should receive, and subsequently did receive, from the vendor 600 fully paid-up shares. Held, that he must account to

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(b) *Metropolitan Bank v. Heiron*, 1880, 5 Ex. Div. 319, C. A.

(c) *Boston Fishing Co. v. Ansell*, 1888, 39 Ch. Div. 339, C. A.; see also *Bulfield v. Fournier*, 1896, 11 T. L. R. 282, C. A.; *Swale v. Ipswich Tannery*, 1906, 11 Com. Cas. 88.

(d) *Salford v. Lever*, (1891) 1 Q. B. 168; 60 L. J. Q. B. 39, C. A.; *Hovenden v. Millhoff*, 1900, 83 L. T. 41, C. A.



the company for the highest value borne by the shares during the time they were held by him, which in this case was assumed to be the nominal value of the shares (*f*).

4. A director of a company, before the transactions between the promoter and the company have been finally completed, accepts his qualification shares from the promoter. The director must account to the company for the highest value attributable to the shares during the time they are held by him, with interest on such value from the date the shares were transferred to him to the date of the action (*g*). So, if a director receives the money to pay for his qualification shares, he must account for the amount received, with interest from the date of its receipt (*h*). Where a promoter sold shares to a director, the director was compelled to account for the difference between the nominal value of the shares and the price he paid for them (*i*).

5. An agent, who was employed to purchase goods, accepted large sums from the vendor by way of bribery, and invested part of the amount. The principal claimed to follow the money, and prayed for an injunction to restrain the agent from dealing with the investment, and an order directing him to bring the amount into court. Held, that the relation between the parties was that of debtor and creditor, not that of trustee and *cestui que trust*, and that the plaintiff was not entitled to follow the money (*k*).

(*f*) *McKay's case*, 1875, 2 Ch. Div. 1; 45 L. J. Ch. 148, C. A.

(*g*) *Nant-y-gla Iron Co. v. Grave*, 1878, 12 Ch. D. 738; *Pearson's case*, 1877, 5 Ch. D. 336; 46 L. J. Ch. 339, C. A.; *Eden v. Ridsdale's Lamp Co.*, 1889, 58 L. J. Q. B. 579, C. A.; *Mitcalfe's case*, 1879, 13 Ch. D. 169; 49 L. J. Ch. 301, C. A.

(*h*) *Hay's case*, 1875, L. R. 10 Ch. 593; 44 L. J. Ch. 721; *McLean's case*, 1885, 55 L. J. Ch. 36.

(*i*) *Weston's case*, 1879, 10 Ch. D. 579; 48 L. J. Ch. 425, C. A.

(*k*) *Lister v. Stubbs*, 1890, 45 Ch. Div. 1; 59 L. J. Ch. 570, C. A.; *Powell v. Jones*, (1905) 1 K. B. 11; 74 L. J. K. B. 115, C. A.

## Article 59.

## WHEN LIABLE TO PAY INTEREST.

No agent is liable to pay interest upon money received by him to the use of his principal, except where he receives or deals with the money improperly, and in breach of his duty (*l*), or refuses to pay it over to the principal on demand (*m*). An agent who receives or deals with the money of his principal improperly, and in breach of his duty, or who refuses to pay it over on demand, is liable to pay interest from the time when he so receives or deals with the same, or from the time of the demand, as the case may be (*l*).

*Illustrations.*

1. An agent, at the request of his principal, retained large sums of money in his hands, and duly accounted for the same. Held, that he was not liable to pay interest, though he had made use of the money for his own purposes (*n*). But, as a general rule, where an agent applies the principal's money to his own use, he is bound to pay interest thereon, it being his duty to act in the agency solely for the principal's benefit (*o*).

2. A solicitor was authorized by power of attorney to sell certain property and invest the proceeds. He paid the pro-

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(*l*) *Wolfe v. Findlay*, 1847, 16 L. J. Ch. 241; 6 Hare, 66; 77 R. R. 16; *Fry v. Fry*, 1864, 10 Jur. N. S. 983. Illustrations 1 to 6.

(*m*) *Harsant v. Blaine*, 1887, 56 L. J. Q. B. 511, C. A.; *Pearse v. Green*, 1819, 1 Jac. & W. 135; 20 R. R. 258. Illustration 5.

(*n*) *Chedworth v. Edwards*, 1802, 8 Ves. 48; 6 R. R. 212.

(*o*) *Rogers v. Boehm*, 1799, 2 Esp. 704.

ceeds into the account of his firm, who made use of the money. Held, that he must pay interest at the rate of five per cent. (*p*).

3. An agent, who undertook to invest his principal's money in the funds, kept large balances in his hands. Held, that he must pay interest on such balances (*q*).

4. An agent had the entire management of his principal's affairs for many years without being called upon for an account. Errors were then discovered, and upon a bill being filed for an account, a large sum was found to be due. Held, that, in the absence of fraud, the agent was not liable to pay interest upon the balances in his hands (*r*). Interest, where it does not arise from contract, can only be awarded as damages for wrongfully withholding money (*s*).

5. The solicitor of the vendor at a sale by auction received a deposit as the agent of the vendor. Held, that he was liable to pay interest thereon from the date of a demand made by the vendor (*t*). But a stakeholder is not liable to pay interest, even if he uses, and himself obtains interest on, the money. Thus, where an auctioneer received a deposit, and invested and obtained interest upon the amount, it was held that he was not liable to pay over the interest on the completion of the sale. In this respect, there is an essential difference between an agent and a stakeholder (*u*).

6. An agent is bound to pay interest upon bribes (*x*), and profits made in the course of his agency without the

(*p*) *Burdick v. Garrick*, 1869, L. R. 5 Ch. 233; 39 L. J. Ch. 369.

(*q*) *Brown v. Southouse*, 1790, 3 Bro. C. C. 107; *Barwell v. Parker*, 1751, 2 Ves. 364.

(*r*) *Turner v. Burkinshaw*, 1867, L. R. 2 Ch. 488.

(*s*) *Webster v. British Empire Ass. Co.*, 1880, 15 Ch. D. 169; 49 L. J. Ch. 769, C. A.

(*t*) *Edgell v. Day*, 1865, L. R. 1 C. P. 80; 35 L. J. C. P. 7.

(*u*) *Harington v. Hoggart*, 1830, 9 L. J. K. B. 14; 1 B. & Ad. 577; 35 R. R. 382.

(*x*) Article 58, Illustrations 2 and 4.

principal's knowledge (*y*), and in all cases of fraud or wilful concealment (*z*).

### Article 60.

#### LIABILITY TO ATTACHMENT.

Where an agent is ordered by a Court of Equity to pay over money received by him in a fiduciary capacity, he may at the discretion of the Court be attached, on default in such payment, though he may have parted with the money, and become a bankrupt or insolvent (*a*).

(*y*) *Benson v. Heathorn*, 1842, 1 Y. & Coll. C. C. 326; 57 B. R. 351; *Tyrrrell v. Bank of London*, 1862, 10 H. L. Cas. 26; 31 L. J. Ch. 369.

(*z*) *Hardwicke v. Vernon*, 1808, 14 Ves. 504; 9 R. R. 329.

(*a*) Debtors Act, 1869, s. 4, sub-s. 3; *Marris v. Ingram*, 1879, 13 Ch. D. 338; 49 L. J. Ch. 123; *Crowther v. Elgood*, 1887, 34 Ch. Div. 691; 56 L. J. Ch. 416, C. A. (auctioneer attached for not paying over the price of goods sold by him); *Litchfield v. Jones*, 1887, 36 Ch. Div. 530; 57 L. J. Ch. 100 (town agent, in an action for an account of his agency by country solicitor); *Lewes v. Barnett*, 1878, 6 Ch. D. 252; 47 L. J. Ch. 144, C. A.; *Preston v. Etherington*, 1887, 4 T. L. R. 47, C. A.; *Re Smith, Hands v. Andrews*, 1893, 9 T. L. R. 238, C. A. See also *Re Edge*, 1891, 63 L. T. 762; *In re Dudley, Ex p. Monet*, 1883, 12 Q. B. D. 44; 53 L. J. Q. B. 16, C. A.; *Re Grey*, 1892, 8 T. L. R. 694, C. A.; *Re Wray*, 1887, 36 Ch. D. 138; 56 L. J. Ch. 1106; *Re Barfield*, 1871, 24 L. T. 248; *Tilney v. Stansfield*, 1880, 28 W. R. 582, as to the attachment of solicitors for default in payment of money due from them as officers of the Court. As to the criminal liability of an agent who fraudulently appropriates or deals with money or goods intrusted to him as such, see 6 & 7 Geo. 5, c. 50, ss. 20, 22.

## Article 61.

## LIABILITY FOR ACTS OF SUB-AGENTS AND CO-AGENTS.

Every agent who employs a sub-agent is liable to the principal for money received by the sub-agent to the principal's use (*b*), and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment (*c*); but co-agents, not being partners, are not, as such, responsible to the principal for the acts or defaults of each other (*d*).

*Illustrations.*

1. A solicitor was held liable to his client for the negligence of his town agent (*e*).

2. A banker was employed to obtain payment of a bill of exchange. His agent obtained payment, and became bankrupt before handing the money over. Held, that the banker was liable to his customer for the amount (*f*). The general rule of law, that an agent is responsible for the acts of a sub-agent employed by him, is not confined to cases where the principal supposes that the agent will act in person (*f*),

(*b*) *Matthews v. Haydon*, 1796, 2 Esp. 509; *In re Mitchell*, 1884, 54 L. J. Ch. 342.

(*c*) *Meyerstein v. Eastern Agency Co.*, 1885, 1 T. L. R. 595; *Lord North's case*, Dy. 161a; *Eccossaise S.S. Co. v. Lloyd*, 1891, 7 T. L. R. 76. Illustrations 1 to 4.

(*d*) *Cullerne v. L. & S. Building Society*, 1890, 25 Q. B. D. 485; 59 L. J. Q. B. 525, C. A.; *Perry's case*, 1876, 34 L. T. 716; *Land Credit Co. v. Fermoy*, 1870, L. R. 5 Ch. 763; *Lucas v. Fitzgerald*, 1904, 20 T. L. R. 16.

(*e*) *Collins v. Griffin*, Barnes, 37.

(*f*) *Mackersy v. Ramsays*, 1843, 9 C. & F. 818; 57 R. R. 183, H. L.

but applies even where the sub-agent is appointed with the principal's knowledge (*g*).

3. A. employs B., as an agent, to make advances upon goods. B. employs C. to make the advances, and authorizes him to draw upon A. for the amounts. C. fraudulently draws upon A. for an amount which he has not advanced. B. is liable to A. for the fraudulent act of C. in the course of his employment (*h*).

4. Moneys are handed, with the approbation of the secretary of a company, to the secretary's private clerk, who is not an officer of the company. The clerk misappropriates the money. The secretary is liable to the company for the amount so misappropriated (*i*).

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(*g*) *Skinner v. Weguelin*, 1882, 1 C. & E. 12.

(*h*) *Swire v. Francis*, 1877, 3 App. Cas. 106; 47 L. J. P. C. 18.

(*i*) *In re Mutual Aid Building Society, Ex p. James*, 1883, 49 L. T. 530.

## CHAPTER X.

## RIGHTS OF AGENTS AGAINST THEIR PRINCIPALS.

Sect. 1.—*Right of Remuneration.*

## Article 62.

## FOUNDED ON AN EXPRESS OR IMPLIED CONTRACT.

THE right of an agent to be remunerated for his services is founded in every case upon an express or implied contract between the principal and agent (*a*). A contract for the payment of remuneration may be implied from custom or usage, from the conduct of the principal, or from the circumstances of the particular case (*b*).

Where the remuneration of an agent is provided for by an express contract, no other contract which is inconsistent with the terms thereof, whether founded on custom or otherwise, can be implied (*c*); but

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(*a*) See Illustration 2.

(*b*) Illustrations 1 to 3.

(*c*) Illustrations 4 and 5. And see Article 63, Illustration 10; Article 64, Illustration 7; *Moore v. Maxwell*, 1848, 2 C. & K. 554; *Marshall v. Parsons*, 1841, 9 C. & P. 656; *Ward v. Stuart*, 1856, 1 C. B. N. S. 88; 107 R. R. 582; *Fullwood v. Akerman*, 1862, 11 C. B. N. S. 737; *Biggs v. Gordon*, 1860, 8 C. B. N. S. 638; *Battams v. Tompkins*, 1892, 8 T. L. R. 707, C. A.; *Caine v. Horsefall*, 1847,

evidence of a particular custom or usage may be given for the purpose of explaining any ambiguity in the terms of the express contract, or for the purpose of incorporating a provision which is not inconsistent with the terms thereof (*d*).

Where the remuneration of an agent is not provided for by an express contract, and the circumstances of his employment are such that a contract for the payment of remuneration may be implied (*e*), the amount of the remuneration, and the conditions under which it becomes payable, must be ascertained from the custom or usage of the particular business (*f*). Where there is no particular custom or usage, the implied contract is to pay reasonable remuneration.

No barrister has any legal right to recover any fee or remuneration for services rendered by him, as such, nor is any promise to pay him for any such services binding, either at law or in equity (*g*).

1 Ex. 519; 17 L. J. Ex. 25; 74 R. R. 748; *Allan v. Sundius*, 1862, 31 L. J. Ex. 307; 1 H. & C. 123; *Parker v. Ibbetson*, 1858, 27 L. J. C. P. 236; 4 C. B. N. S. 346; 114 R. R. 752; *Phillipps v. Briard*, 1856, 25 L. J. Ex. 233.

(*d*) See note (c), *supra*, p. 191.

(*e*) Illustrations 1 to 3.

(*f*) Illustration 6. *Cohen v. Paget*, 1814, 4 Camp. 96; *Burnett v. Bouch*, 1840, 9 C. & P. 620; *Broad v. Thomas*, 1830, 7 Bing. 99; 33 R. R. 399; *Rucker v. Lunt*, 1863, 3 F. & F. 959; *Baring v. Stanton*, 1876, 3 Ch. Div. 502; *Hull v. Benson*, 1836, 7 C. & P. 711; *Kirk v. Evans*, 1890, 6 T. L. R. 9; *Turner v. Reeve*, 1901, 17 T. L. R. 592.

(*g*) *Kennedy v. Broun*, 1864, 32 L. J. C. P. 137; 13 C. B. N. S. 677 Ch. App.; *Re May*, 1858, 4 Jur. N. S. 1169.



*Illustrations.*

1. A. entered into an agreement in the following terms—“I hereby agree to enter your service as weekly manager, and the amount of payment I am to receive I leave entirely to you”—and served in that capacity for six weeks. Held, that there was an implied contract to make some payment, at all events, and that A. was entitled, in an action on a *quantum meruit*, to recover such an amount as the employer, acting in good faith, ought to have awarded (*h*).

2. A committee resolved that any services rendered by A. should be taken into consideration, and such remuneration be paid to him as should be deemed right. Held, that no action would lie at the suit of A. to recover such remuneration, the resolution importing that the committee were to judge whether any, and, if so, what remuneration was due for his services (*i*). Service, however long continued, creates no right to remuneration unless there is a contract to pay it; and such a contract will only be implied where the circumstances are such as to indicate an understanding between the parties that there should be remuneration (*k*).

3. A. employs an auctioneer to sell property on his behalf. A contract by A. to pay the auctioneer the usual commission is implied (*l*). So, the mere employment of a professional man, as such, raises a presumption of an intention to remunerate him, and an agreement to do so is always implied

(*h*) *Bryant v. Flight*, 1839, 5 M. & W. 114. See also *Jewry v. Busk*, 1814, 5 Taunt. 302; *Bird v. M'Gahey*, 1849, 2 C. & K. 707.

(*i*) *Taylor v. Brewer*, 1813, 1 M. & S. 290; 21 R. R. 831. See also *Roberts v. Smith*, 1859, 28 L. J. Ex. 164; 4 H. & N. 315; 118 R. R. 462.

(*k*) *Reeve v. Reeve*, 1858, 1 F. & F. 280; 115 R. R. 911; *Foord v. Morley*, 1859, 1 F. & F. 496; 115 R. R. 949. See also *Hulse v. Hulse*, 1856, 25 L. J. C. P. 177; 17 C. B. 711; 104 R. R. 852.

(*l*) *Miller v. Beale*, 1879, 27 W. R. 403; *Turner v. Reeve*, 1901, 17 T. L. R. 592.

from such an employment, in the absence of other circumstances rebutting the presumption (*m*).

4. It was agreed that an agent should receive commission on "all sales effected or orders executed by him." By a custom of trade, no commission was payable in respect of bad debts. Held, that the agent was, nevertheless, entitled to commission on all sales effected by him, including those resulting in bad debts, the custom being inconsistent with the terms of the contract (*n*).

5. An agent is employed to find a purchaser for certain property at a fixed commission, to be payable only in the event of success. He is not entitled to a *quantum meruit* in the absence of success, such a claim being excluded by the express contract (*o*). So, where it was agreed that a sailor should be paid a fixed sum, provided he continued to serve, and did his duty, during the whole voyage, it was held that no wages could be claimed, either on a *quantum meruit* or otherwise, in the event of his dying before the completion of the voyage (*p*). On the other hand, where an engineer contracted to perform certain works, calculated to take fifteen months, for a sum of 500*l.*, payable by quarterly instalments, and died during the work, it was held that his representatives were entitled to recover two instalments which had accrued due, and were unpaid, at the time of his death (*q*).

6. A London shipbroker negotiated for the hire of a vessel, and a memorandum of charter was duly signed, but the contract afterwards went off. By a custom of the City of London, shipbrokers who negotiate the hire of vessels are

(*m*) *Manson v. Baillie*, 1855, 2 Macq. H. L. Cas. 80, H. J.

(*n*) *Bower v. Jones*, 1831, 8 Bing. 65.

(*o*) *Green v. Mules*, 1861, 30 L. J. C. P. 343; *M'Leod v. Artola*, 1889, 6 T. L. R. 68; *Salter's claim*, 1891, 7 T. L. R. 602; *Lott v. Outhwaite*, 1893, 10 T. L. R. 76, C. A. Article 63, Illustration 10.

(*p*) *Cutter v. Powell*, 1795, 6 T. R. 320; 3 R. R. 185.

(*q*) *Stubbs v. Holywell Rail. Co.*, 1867, L. R. 2 Ex. 311; 36 L. J. Ex. 166.

entitled to a certain commission on the amount of the freight, where the contracts are completed, the rate of payment being higher than would fairly compensate them for their services; but are not entitled to any remuneration with respect to contracts which are not completed. Held, that the broker was not entitled to recover either commission or a *quantum meruit* for the services rendered, even if the contract went off owing to the act of the principal. The implied contract to pay an agent reasonable remuneration for his services does not arise when there is an express agreement, or one to be inferred from custom, which is inconsistent therewith (*r*).

### Article 63.

#### COMMISSION ONLY ON TRANSACTIONS DIRECTLY RESULTING FROM THE AGENCY.

Where the remuneration of an agent is a commission upon transactions brought about by him, or is only payable in the event of a transaction being brought about by him, he is not entitled to be paid such remuneration unless the transaction in respect of which it is claimed is a direct, though not necessarily an immediate, result of his agency (*s*), and is a transaction the bringing about of which was within the scope of his employment (*t*); but it is

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(*r*) *Read v. Rann*, 1830, 8 L. J. K. B. 144; 10 B. & C. 438; 34 R. R. 473; *Broad v. Thomas*, 1830, 7 Bing. 99; 33 R. R. 399; *Harley v. Nagata*, 1917, 34 T. L. R. 124. Cf. *Moor Line v. Dreyfus*, (1918) 1 K. B. 89; 118 L. T. 87, C. A.; *Walford v. Les Affrèteurs Reunis*, (1918) 2 K. B. 498, C. A.

(*s*) *Bray v. Chandler*, 1856, 18 C. B. 718; 107 R. R. 479; *Jeffrey v. Crawford*, 1890, 7 T. L. R. 618, C. A.; *Bayley v. Chadwick*, 1878, 39 L. T. 429, H. L.; *Beable v. Dickerson*, 1885, 1 T. L. R. 654. And see Illustrations.

(*t*) *Toulmin v. Millar*, 1887, 58 L. T. 96, H. L. Illustration 3.

not necessary, in order to entitle him to payment of such remuneration, that he should complete the transaction, or even that he should be acting for the principal at the time of the completion thereof (*u*).

The question whether an agent is entitled to commission upon business arising wholly after his employment has ceased, as a result of his introduction, depends upon the nature and terms of his employment. *Primâ facie*, he is not so entitled (*x*).

#### *Illustrations.*

1. A. employs B., a broker, to obtain a contract for a charter-party. B. introduces C., who is also a broker. C. introduces D., who obtains a contract. B. has no claim upon A. for commission, the transaction being too remote a consequence of his introduction. A custom for a broker to be paid commission in such a case is invalid (*y*).

2. A house agent lets a house for a term of years, the tenant having the option of taking it for a further term. The tenant afterwards, through the intervention of another agent, takes the house for a further term at a different rent. The first-mentioned agent is not entitled to commission in respect of the further term, and a trade custom to pay commission to the original agent under such circumstances is invalid. He is entitled to commission only upon the rent obtained as a proximate consequence of his own acts (*z*).

(*u*) Illustrations 5 to 11. *Wilkinson v. Martin*, 1837, 8 C. & P. 1.

(*x*) Illustration 13. *Hilton v. Helliwell*, (1894) 2 Ir. R. 94; *Boyd v. Mathers*, 1893, 9 T. L. R. 443, C. A.; *Morris v. Hunt*, 1896, 12 T. L. R. 187; *Barrett v. Gilmour*, 1901, 6 Com. Cas. 72; *Gerahty v. Baines*, 1903, 19 T. L. R. 554; *Bickley v. Browning*, 1913, 30 T. L. R. 134.

(*y*) *Gibson v. Crick*, 1862, 31 L. J. Ex. 304; 1 H. & C. 142. *Comp. Wilkinson v. Alston*, 1879, 48 L. J. Q. B. 733, C. A.

(*z*) *Curtis v. Nixon*, 1871, 24 L. T. 706. See also *Ex p. Chatteris*, 1874, 22 W. R. 289; *Lofts v. Bourke*, 1884, 1 T. L. R. 58; *Millar v. Radford*, 1903, 19 T. L. R. 575, C. A.

3. An agent is employed to let an estate, and procures a tenant. The tenant subsequently buys the estate without any further communication with the agent. The agent is not entitled to any commission in respect of the sale (a).

4. A. entered into an agreement with B. in the following terms:—"In case of your introducing a purchaser (of a certain business) of whom I approve, or capital which I should accept, I could pay you five per cent. commission, provided no one else is entitled to commission in respect of the same introduction." B. introduced C., who advanced 10,000*l.* by way of loan, and B. was duly paid his commission in respect of that advance. Some months afterwards, A. and C. entered into an agreement for a partnership, C. advancing a further 4,000*l.* by way of capital. Held, that B. was not entitled to commission on the 4,000*l.*, that amount having been advanced in consequence of the negotiations between A. and C. for a partnership, with which B. had nothing to do (b). It is not sufficient for the agent to show that the transaction would not have been entered into but for his introduction. He must show that the introduction is the direct cause of the transaction (b).

5. An estate agent, who was employed to find a purchaser for certain property, introduced a person to his principal on January 7th. A few days afterwards, the principal became a bankrupt. On January 17th, further negotiations took place between the person introduced and the trustee in bankruptcy, resulting in a sale of the property on January 24th. Held, that the sale was brought about by the agent's introduction, and that he was entitled to prove in the bankruptcy for the amount of his commission (c).

6. An auctioneer and estate agent was employed to sell an

(a) *Toulmin v. Millar*, 1887, 58 L. T. 96, H. L.; *Nightingale v. Parsons*, (1914) 2 K. B. 621; 83 L. J. K. B. 742, C. A.

(b) *Tribe v. Taylor*, 1876, 1 C. P. D. 505; *Boyd v. Tovil Paper Co.*, 1884, 4 T. L. R. 332, C. A.; *Millar v. Radford*, 1903, 19 T. L. R. 575, C. A.

(c) *Ex p. Durrant, Re Beale*, 1888, 5 M. B. R. 37.

estate, a reserve price being fixed, commission to be paid if the estate should be sold. He put it up for sale, but it was not sold. A person, who attended the sale, afterwards asked the auctioneer who was the owner of the property, was referred by him to the principal, and eventually became the purchaser of the estate. Held, that the auctioneer was the *causa causans* of the sale, and was therefore entitled to his commission, although, before the actual sale, the vendor had withdrawn the property from him (*d*). An agent who really brings about the relationship of buyer and seller is entitled to commission, though he does not actually complete the contract (*d*).

7. A house agent was instructed to offer a house for sale, and it was agreed that he should receive  $2\frac{1}{2}$  per cent. commission on the price if he found a purchaser, or a guinea for his services if the house was sold without his intervention. A person called on the agent and obtained an order to view, but thought that the price was too high. The same person subsequently renewed negotiations with a friend of the principal's, and ultimately bought the house. Held, that there was evidence for the jury that the house was sold through the intervention of the agent, so as to entitle him to his commission (*f*).

8. A brewery company agreed to pay an agent commission on all licensed property it might purchase through his introduction. The company promoted a new company, which acquired property introduced to the old company's notice by

(*d*) *Green v. Bartlett*, 1863, 32 L. J. C. P. 261; 14 C. B. N. S. 681; *Walker v. Fraser*, (1910) S. C. 222; *Burchell v. Gowrie, &c. Collieries*, (1910) A. C. 614; 80 L. J. P. C. 41.

(*f*) *Mansell v. Clements*, 1874, L. R. 9 C. P. 139. See also *Barnett v. Brown*, 1890, 6 T. L. R. 463; *Steere v. Smith*, 1886, 2 T. L. R. 231; *Bayley v. Chadwick*, 1878, 39 L. T. 429, H. L.; *Burton v. Hughes*, 1885, 1 T. L. R. 207; *Thompson v. Thomas*, 1896, 11 T. L. R. 304, C. A. Comp. *Brandon v. Hanna*, (1907) 2 Ir. R. 212, C. A.

the agent. Held, that the new company being merely ancillary to the old, the agent was entitled to commission on the properties purchased (*g*).

9. An agent introduced a person to his principal as a possible purchaser of certain property, but no terms were arrived at. The principal subsequently sold the property by auction, the person introduced by the agent being the purchaser. Held, that the agent was not entitled to commission (*h*).

10. A. agreed to pay B. a commission of 5,000*l.* in the event of B. introducing a purchaser of A.'s business. B. failed to find a purchaser, but introduced C., an accountant, as a person who might be able to introduce a purchaser. C. eventually himself bought the property at the proposed price after deducting the commission which he was to have been paid in the event of his finding a purchaser. Held, that there was no evidence for the jury that B. had introduced a purchaser of the business, he having introduced C., not as a purchaser, but as an agent to find a purchaser, and that B. could not recover either the agreed commission or a *quantum meruit*, the claim for a *quantum meruit* being excluded by the express contract (*i*).

11. A. employed B. to sell an estate in lots. C. bought certain lots, and B. received commission thereon. A. then withdrew B.'s authority, and C. subsequently bought the remaining lots by private contract. Held, that the jury were entitled to find that the ultimate sale was not due to B.'s introduction (*k*). But if it appears that the agent's introduction is the foundation of the negotiations resulting in an ultimate sale, the principal cannot deprive him of his commission by withdrawing the property from his hands.

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(*g*) *Gunn v. Showell's Brewery Co.*, 1902, 50 W. R. 659, C. A.

(*h*) *Taplin v. Barrett*, 1889, 6 T. L. R. 30.

(*i*) *Barnett v. Isaacson*, 1888, 4 T. L. R. 645, C. A.

(*k*) *Lumley v. Nicholson*, 1886, 34 W. R. 716.

The proper question for the jury is—"Did the sale really and substantially proceed from the agent's acts?" (*l*).

12. An agent claims commission for procuring a loan. It is not sufficient to show that the loan indirectly resulted from his intervention. He must show that it was obtained by means of the agency, from the parties to whom he applied. If third persons casually heard that a loan was wanted, and lent the money directly to the principal, the agent cannot claim commission thereon (*m*).

13. An agent is employed to sell goods on commission, and the principals agree "to allow him commission upon all orders executed by them and paid for by the customers arising from his introduction." He is entitled to commission on all orders executed for customers introduced by him, even if the orders are received after his dismissal from the principals' employment (*n*). So, where the agreement was to pay commission on all accounts introduced by the agent, so long as the principals continued to do business with the persons he placed on their books, it was held that the commission continued to be payable to the agent's executors after his death (*o*). But, apart from any express stipulation, the general rule is that a principal is not liable to pay commission upon orders sent by his agent's customers after the agent has ceased to represent him (*p*).

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(*l*) *Wilkinson v. Martin*, 1837, 8 C. & P. 1.

(*m*) *Antrobus v. Wickens*, 1865, 4 F. & F. 291.

(*n*) *Bilbee v. Hasse*, 1889, 5 T. L. R. 677; *Salomon v. Brownfield*, 1896, 12 T. L. R. 239; *Robey v. Arnold*, 1897, 14 T. L. R. 39.

(*o*) *Wilson v. Harper*, (1908) 2 Ch. 370; 77 L. J. Ch. 607; *Levy v. Goldhill*, (1917) 2 Ch. 297; 86 L. J. Ch. 693.

(*p*) *Naylor v. Yearsley*, 1860, 2 F. & F. 41; *Weare v. Brimsdown Lead Co.*, 1910, 103 L. T. 429; *Sales v. Crispi*, 1913, 29 T. L. R. 491; *Marshall v. Glanvill*, (1917) 2 K. B. 87; 86 L. J. K. B. 767.



## Article 64.

REMUNERATION MAY BE PAYABLE THOUGH THE  
PRINCIPAL ACQUIRES NO BENEFIT.

Where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do (*q*), even if the principal acquires no benefit from his services (*q*), and except where there is an express agreement or special custom to the contrary (*r*), even if the transaction in respect of which the remuneration is claimed falls through, provided that it does not fall through in consequence of any act or default of the agent (*q*).

*Illustrations.*

1. A. employed B. to procure a loan, and entered into the following agreement:—"In the event of your obtaining me the sum of 2,000*l.*, or such other sum as I shall accept, I agree to pay you a commission of 2½ per cent. on the amount received." B. introduced A. to a building society, who offered to lend 1,625*l.* upon certain terms, which were accepted by A. The transaction afterwards went off because A. would not satisfy certain requirements of the society, and

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(*q*) Illustrations 1 to 6. *Webb v. Rhodes*, 1837, 3 Bing. N. C. 732; 43 R. R. 790; *Moir v. Marten*, 1891, 7 L. T. R. 330, C. A.; *Nosotti v. Auerbach*, 1898, 79 L. T. 413. A *del credere* commission is due and payable immediately the contract in respect of which it is claimed is made. *Solly v. Weiss*, 1818, 2 Moo. 420, Ex. Ch.; *Caruthers v. Graham*, 1811, 14 East, 578.

(*r*) Illustration 7.

failed to show a sufficient title to the property upon which the loan was to have been made. Held, that B. was entitled to his commission of  $2\frac{1}{2}$  per cent. upon 1,625*l.*, the amount the society offered to advance (*t*).

2. An agent who was employed to borrow a certain sum upon leasehold security, found a person able and willing to lend that sum, but the transaction fell through in consequence of unusual covenants in the leases, of which covenants the agent had no knowledge. Held, that he was entitled to the whole of the agreed commission for procuring the loan (*u*). If an agent, employed to negotiate a loan, brings the principals together, and nothing more remains for him to do, he is entitled to his commission, even if the contract afterwards goes off without any default by his principal (*x*).

3. It was agreed that an agent should receive commission upon "all goods bought through him." He obtained an order for goods, which the principal accepted, but was unable to execute, so that no benefit resulted therefrom. Held, that the agent was entitled to commission upon the order (*y*). As a general rule, an agent is entitled to his commission whenever he procures a binding bargain which the principal accepts (*y*).

4. A. promised to pay B. 5*l.* if he should succeed in obtaining a purchaser for a lease at a certain price. B. introduced C., who entered into a contract with A., and paid a deposit. C. was unable to complete the purchase, and A.

(*t*) *Fisher v. Drewett*, 1879, 48 L. J. Ex. 32, C. A. Comp. *Salter's claim*, 1891, 7 T. L. R. 602; *Peacock v. Freeman*, 1888, 4 T. L. R. 541, C. A.

(*u*) *Green v. Lucas*, 1876, 33 L. T. 584; 31 L. T. 731, C. A.

(*x*) *Fuller v. Eames*, 1892, 8 T. L. R. 278. See judgment of Bramwell, L. J., in *Fisher v. Drewett*, 48 L. J. Ex. 32, *supra*; *Passingham v. King*, 1898, 14 T. L. R. 392, C. A.

(*y*) *Lockwood v. Levick*, 1860, 29 L. J. C. P. 340; 8 C. B. N. S. 603; *Hill v. Kitching*, 1846, 15 L. J. C. P. 251; 3 C. B. 299; 71 R. R. 355; *Harris v. Petherick*, 1878, 39 L. T. 543; *Vulcan Car Agency v. Fiat Motors*, 1915, 32 T. L. R. 73.

permitted the contract to be cancelled, A. retaining the deposit. Held, that B. had substantially performed his undertaking, and was entitled to payment of the 5*l.* promised (*z*). But the agent has no right to commission in such a case, unless the contract made is complete and binding (*a*).

5. An agent was employed on commission to purchase certain property. He purchased the property, subject to his principal's solicitor's approval of the title. The principal broke off the transaction, and the title was never submitted to his solicitor. Held, that in order to maintain an action for the commission, the agent ought to show either that the principal's solicitor approved the title, or that such a title was submitted to him as he could not reasonably disapprove, and that unless the agent could prove that the seller had a good title, he could not recover the commission (*b*).

6. A. promised to pay B. 2½ per cent. commission in the event of his finding a purchaser of certain land at the price of 3,000*l.* B. introduced C., who took a lease for 1,000 years at a yearly rent of 150*l.*, with an option to purchase the land, within twenty years, for 3,000*l.* Held, that B. had practically found a purchaser, and was therefore entitled to the commission (*c*).

7. An agent was employed to sell an advowson, and it was expressly agreed that the commission should be paid when the abstract of conveyance was drawn out. He found a purchaser, who entered into a contract, but the abstract was not delivered, and negotiations were dropped. Held, that the agent was not entitled to recover the commission, the event upon which it was to become payable not having hap-

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(*z*) *Horford v. Wilson*, 1807, 1 Taunt. 12; *Lara v. Hill*, 1863, 15 C. B. N. S. 45; *Platt v. Depree*, 1893, 9 T. L. R. 194; *Passingham v. King*, 1898, 14 T. L. R. 392, C. A.; *Skinner v. Andrews*, 1910, 26 T. L. R. 340, C. A. Comp. *Chapman v. Winson*, 1904, 91 L. T. 17, C. A.

(*a*) *Grogan v. Smith*, 1890, 7 T. L. R. 132, C. A.

(*b*) *Clack v. Wood*, 1882, 9 Q. B. D. 276, C. A.

(*c*) *Rimmer v. Knowles*, 1874, 30 L. T. 496.

pened (*d*). So, where it was agreed that commission should be paid "upon the sum which might be obtained," it was held that it could not be recovered until the principal had actually received the amount (*e*). So, if there is a special trade custom whereby the agent is not entitled to commission unless the transaction in respect of which it is claimed be completed, he cannot recover the commission until completion, even if the transaction falls through in consequence of the principal's default (*f*).

8. *Costs of conducting suit, when payable.* An undertaking by a solicitor to conduct a suit constitutes an entire contract, and he cannot maintain an action for the costs, nor does the Statute of Limitations commence to run against him, until the termination of the suit (*g*), except where he is discharged, or his retainer is repudiated, by the client (*h*). But this principle does not apply to such a matter as a bankruptcy or winding-up, or an administration action (*i*).

(*d*) *Alder v. Boyle*, 1847, 16 L. J. C. P. 232; 4 C. B. 635; *Lott v. Outhwaite*, 1893, 10 T. L. R. 76, C. A.; *Chapman v. Winson*, 1904, 91 L. T. 17, C. A.; *Henry v. Gregory*, 1905, 22 T. L. R. 53.

(*e*) *Bull v. Price*, 1831, 5 M. & P. 2; *Beningfield v. Kynaston*, 1887, 3 T. L. R. 279, C. A.; *Martin v. Tucker*, 1885, 1 T. L. R. 655; *Dideott v. Friesner*, 1896, 11 T. L. R. 187, C. A.; *White v. Turnbull*, 1898, 78 L. T. 726, C. A.; *Beale v. Bond*, 1901, 84 L. T. 313, C. A.; *Foster's Agency v. Romaine*, 1916, 32 T. L. R. 545, C. A.

(*f*) *Read v. Rann*, 1830, 10 B. & C. 438; 8 L. J. K. B. 144; 34 R. R. 473; *Broad v. Thomas*, 1830, 7 Bing. 99; 33 R. R. 399. See Article 62, Illustration 6.

(*g*) *Harris v. Quine*, 1869, L. R. 4 Q. B. 653; 38 L. J. Q. B. 331; *Whitehead v. Lord*, 1852, 7 Ex. 691; 21 L. J. Ex. 239; 86 R. R. 797; *Martindale v. Falkner*, 1846, 2 C. B. 706; 69 R. R. 602.

(*h*) *Hawkes v. Cottrell*, 1858, 27 L. J. Ex. 369; 3 H. & N. 243; 117 R. R. 672.

(*i*) *Re Hall and Barker*, 1878, 9 Ch. D. 538; 47 L. J. Ch. 621.

## Article 65.

PRINCIPAL LIABLE IN DAMAGES IF HE WRONGFULLY  
PREVENTS AGENT FROM EARNING REMUNERATION.

Where a principal, in breach of an express or implied contract with his agent (*k*), refuses to complete a transaction, or otherwise prevents the agent from earning his remuneration, the agent is entitled to recover, by way of damages, the loss actually sustained by him as a natural and probable consequence of such breach of contract (*l*). The measure of damages, where nothing further remains to be done by the agent, is the full amount that he would have earned if the principal had duly completed the transaction, or otherwise carried out his contract with the agent (*m*).

Where the authority of an agent is revoked by the principal, or the agency is otherwise determined, after it has been partially executed, or after the agent has endeavoured to execute it, the question whether the agent is entitled to any, and if so, to what remuneration for the work previously done, depends upon the nature and terms of his employ-

(*k*) Illustrations 2 to 7.

(*l*) Illustrations 1 to 6. *Vickers v. Church Extension Association*, 1888, 4 T. L. R. 674.

(*m*) *Prickett v. Badger*, 1856, 26 L. J. C. P. 33; 1 C. B. N. S. 296; 107 R. R. 668; *Roberts v. Barnard*, 1884, 1 C. & E. 336; *Harris v. Petherick*, 1878, 39 L. T. 543. Illustration 1. *Comp. Peacock v. Freeman*, 1888, 4 T. L. R. 541, C. A.

ment, and the custom or usage of the particular business in which he is employed (*n*).

*Illustrations.*

1. A. employs B. to find a purchaser for certain property at a fixed price, and promises to pay him commission in the event of a sale being effected. B. finds a purchaser at the price fixed, but A. refuses to complete the transaction. B. is entitled, in an action against A. for wrongfully preventing him from earning his commission, to recover the full amount that he would have been entitled to if the transaction had been duly completed (*o*). But this rule does not apply if there is a special custom whereby the agent is entitled to remuneration only in the event of the transaction in respect of which it is claimed being completed, the rate of remuneration being higher than would fairly compensate him for the services rendered (*p*).

2. A. contracted to employ B., and B. to serve A., as agent for the sale of such goods as should be forwarded or submitted to B. by sample from time to time, the agreement to be determined at the end of five years by notice from either party. Before the expiration of the five years, A.'s factory was burnt down, and the business was not resumed. In an action by B. for breach of contract, the Court of Appeal held that there was no implied condition that the contract should determine on the destruction of the factory, and that B. was entitled to substantial damages (*q*).

(*n*) *Queen of Spain v. Parr*, 1869, 39 L. J. Ch. 73; *Simpson v. Lamb*, 1856, 25 L. J. C. P. 113; 17 C. B. 603; 104 R. R. 806. Illustration 9.

(*o*) *Prickett v. Badger*, 1856, 1 C. B. N. S. 296; 26 L. J. C. P. 33; 107 R. R. 668.

(*p*) *Broad v. Thomas*, 1830, 7 Bing. 99; 33 R. R. 399; *Read v. Rann*, 1830, 10 B. & C. 438; 8 L. J. K. B. 144; 34 R. R. 473. Article 62, Illustration 6.

(*q*) *Turner v. Goldsmith*, (1891) 1 Q. B. 544; 60 L. J. Q. B. 247,

3. A. and B. agreed, in consideration of the services and payments to be mutually rendered and made, that for seven years, or so long as A. should continue business at L., A. should be sole agent there for the sale of B.'s coals. About four years afterwards B. sold his colliery. Held, by the House of Lords, that B. was under no obligation to continue the business, but only to employ A. as agent for the sale of such coals as he might send to L., and that the agency necessarily determined when the subject-matter thereof was gone (*r*). It is not easy to reconcile this decision with the decision in the preceding illustration (*s*).

4. A firm agreed to employ an agent for a specified term. During the term, one of the partners died. Held, that the parties contracted with reference to the existing partnership, subject to an implied condition that all the parties should so long live, and that, therefore, the agent was not entitled to damages from the other partners for refusing to continue the employment (*t*). Otherwise, if the partnership had been dissolved by agreement (*u*).

5. A company employed a broker to dispose of its shares, and agreed to pay him 100*l.* down, and a further 400*l.* on the allotment of all the shares. The broker disposed of a considerable number of the shares, and then the company was voluntarily wound up. Held, that the broker was prevented earning the 400*l.* by the act of the company, and was entitled to recover such damages for the breach of

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C. A. See also *Emmens v. Elderton*, 1852, 4 H. L. Cas. 624; 94 R. R. 288, H. L.; *Nielans v. Cuthbertson*, 1891, 7 T. L. R. 516, C. A.

(*r*) *Rhodes v. Forwood*, 1876, 1 App. Cas. 256; 47 L. J. Ex. 396, H. L.; *Northey v. Trevillion*, 1902, 7 Com. Cas. 201; *Bovine v. Dent*, 1904, 21 T. L. R. 82; *Lazarus v. Cairn Line*, 1912, 106 L. T. 378. Comp. *Stirling v. Maitland*, 1864, 34 L. J. Q. B. 1; 5 B. & S. 840. As to the meaning of "sole agent," see *Snelgrove v. Ellringham Colliery Co.*, 1881, 45 J. P. 408.

(*s*) But see *Northey v. Trevillion*, 1902, 7 Com. Cas. 201.

(*t*) *Tasker v. Shepherd*, 1861, 30 L. J. Ex. 207; 6 H. & N. 575. Comp. *Phillips v. Hull Alhambra*, (1901) 1 K. B. 59; 70 L. J. K. B. 26.

(*u*) *Brace v. Calder*, (1895) 2 Q. B. 253; 64 L. J. Q. B. 582, C. A. But see *Bovine v. Dent*, 1904, 21 T. L. R. 82.

contract as the jury thought reasonable. The jury awarded him 250*l.* (*x*).

6. A. was engaged for a fixed term by a company as a traveller, and it was agreed that he should receive by way of remuneration a commission upon all orders obtained, but no salary. After A. had established a connection, and before the expiration of the term for which he was engaged, the company wound up voluntarily. Held, that A. was entitled to recover damages for the loss of the commission that he would have earned during the remainder of the term (*y*). It was pointed out that, had the case been otherwise decided, the company might have immediately commenced business again, and so obtained the benefit of A.'s connection without paying for it (*y*).

7. An agent was employed by an insurance company for a term of five years, at a fixed salary of 500*l.* a year and a commission on the profits, the agent undertaking to transact no other business during the term. The company wound up voluntarily before the expiration of the term. Held, that the agent was not entitled to prove in the winding-up for prospective commission, the contract merely importing that a commission on the profits was to be paid if the company found it profitable to carry on the business, and chose to do so. Such a contract gives the agent no right to insist upon the business being carried on (*z*). It will be observed that in this case, a salary was paid, whereas, in Illustration 6, the agent received commission only. But it is not easy to reconcile the decisions, and it would seem that each case must

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(*x*) *Inchbald v. Western Neilgherry Coffee, &c. Co.*, 1864, 34 L. J. C. P. 15; 17 C. B. N. S. 733.

(*y*) *In re Patent Floor Cloth Co., Dean and Gilbert's claim*, 1872, 41 L. J. Ch. 476. See also *Re London and Colonial Co., Ex p. Clark*, 1869, L. R. 7 Eq. 550; 38 L. J. Ch. 562; *Reigate v. Union Manufg. Co.*, (1918) 1 K. B. 592; 87 L. J. K. B. 724. •

(*z*) *In re English and Scottish Marine Insurance Co., Ex p. Maclure*, 1870, L. R. 5 Ch. 737; 39 L. J. Ch. 685, Ch. App. See also *Re Newman, Raphael's claim*, (1916) 2 Ch. 309; 85 L. J. Ch. 625, C. A.



depend upon the presumed intention of the parties to be ascertained from the particular circumstances.

8. The articles of association of a company provided that in the event of the manager being dismissed for any cause other than gross misconduct, he should be paid a certain sum by way of compensation. Held, that he was entitled to prove for such sum in the winding-up of the company (*a*).

9. An agent was employed to sell an advowson. Before he succeeded in finding a purchaser, the principal sold it privately. Held, in an action for wrongful revocation of authority, that the agent was not entitled to recover anything, in the absence of evidence of expense incurred by him (*b*). Where the authority of an agent for sale is revoked before a sale is effected, the question whether he has a right to remuneration for what he has done in trying to effect a sale depends upon the terms of his employment. Unless there is an express contract to pay the agent remuneration for his trouble, or the circumstances are such as to show that that was the intention of the parties, he is not entitled to recover in such a case; at all events, without proof of damage (*b*).

#### Article 66.

#### NO REMUNERATION IN RESPECT OF UNLAWFUL OR WAGERING TRANSACTIONS.

No agent can recover any remuneration for his services unless at the time when the services were

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(*a*) *In re London and Scottish Bank, Ex p. Logan*, 1870, L. R. 9 Eq. 149; *In re Imperial Wine Co., Shirreff's case*, 1872, L. R. 14 Eq. 417; 42 L. J. Ch. 5. See also *Re Dale and Plant*, 1890, 6 T. L. R. 123, as to the right of a managing director to prove in such a case.

(*b*) *Simpson v. Lamb*, 1856, 17 C. B. 603; 25 L. J. C. P. 113; 104 B. R. 806; *Nouh v. Owen*, 1886, 2 T. L. R. 364, C. A.; *Brinson v. Davies*, 1911, 105 L. T. 134.

rendered he was legally qualified to act in the capacity in which he claims the remuneration (*e*).

No agent can recover any remuneration in respect of any transaction which is obviously, or to his knowledge, unlawful (*d*), or in respect of any gaming or wagering contract or agreement rendered null and void by the Gaming Act, 1845 (*e*), or of any services in relation thereto or connection therewith (*f*).

#### *Illustrations.*

1. A solicitor cannot maintain an action for costs unless his certificate was in force at the time when the work for which the costs are claimed was done (*g*). So, a broker (*h*) or appraiser (*i*) cannot maintain any action for commission or remuneration as such, unless he was duly licensed to act in that capacity.

2. An action was brought for work performed and money expended in buying shares in a certain company. The company affected to act as a body corporate without authority by charter or statute, and was, therefore, illegal. Held, that the action was not maintainable, because it arose out of an unlawful transaction (*k*). So, a broker cannot recover com-

(*c*) Illustration 1.

(*d*) Illustrations 2 and 3. *Walker v. Nightingale*, 1726, 4 Bro. P. C. 193.

(*e*) 8 & 9 Vict. c. 109.

(*f*) 55 Vict. c. 9. Illustration 4.

(*g*) *R. v. Brunswick and Crowl*, 1849, 4 Ex. 492; 19 L. J. Ex. 112; 37 & 38 Vict. c. 68, s. 12; *Re Sweeting*. (1898) 1 Ch. 268; 67 L. J. Ch. 159. As to disbursements, see *Kent v. Ward*, 1894, 70 L. T. 612, C. A.

(*h*) *Copé v. Rowlands*, 1836, 6 L. J. Ex. 63; 2 M. & W. 149; 46 R. R. 532.

(*i*) *Palk v. Force*, 1848, 12 Q. B. 666; 17 L. J. Q. B. 299.

(*k*) *Josephs v. Pebrer*, 1825, 3 B. & C. 63.

mission for effecting a contract of marine insurance which is not contained in a duly stamped policy (*l*), or for effecting any illegal insurance (*m*), or in respect of an illegal sale of offices (*n*). Every agreement to pay remuneration in respect of any such unlawful transaction is absolutely void (*n*). So, a stockbroker cannot recover commission or brokerage in respect of a purchase or sale of stock or shares, unless he sends the principal a duly stamped contract note (*o*).

3. Commission was claimed by a broker for procuring freight. Held, that the fact that the charter-party, in respect of which the commission was claimed, would be illegal unless the charterer obtained certain licenses, was no answer to the action, it not being part of the broker's duty to see that the licenses were obtained (*p*).

4. The Gaming Act, 1892 (55 Vict. c. 9), provides that any promise, express or implied, to pay any sum by way of commission, fee, or reward, or otherwise, in respect of any contract or agreement rendered null and void by the 8 & 9 Vict. c. 109, or of any services in relation thereto or connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum. Prior to this Act it was held that a plea of "gaming and wagering" was no answer to an action by a stockbroker for commission upon purchases and sales of stock or shares, gaming and wagering contracts not being rendered unlawful by the 8 & 9 Vict. c. 109, but merely null and void (*q*).

(*l*) The Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 95, 97.

(*m*) *Allkins v. Jupe*, 1877, 2 C. P. D. 375; 46 L. J. C. P. 824.

(*n*) *Stackpole v. Erle*, 1761, 2 Wils. 133; *Waldo v. Martin*, 1825, 4 B. & C. 319; 28 R. R. 289; *Parsons v. Thompson*, 1790, 1 H. Bl. 322; 2 R. R. 773.

(*o*) 10 Edw. 7, c. 8, s. 78 (3); *Learoyd v. Bracken*, (1894) 1 Q. B. 114; 63 L. J. Q. B. 96, is not now law.

(*p*) *Haines v. Busk*, 1814, 5 Taunt. 521.

(*q*) *Knight v. Fitch*, 1855, 24 L. J. C. P. 122; 15 C. B. 566. As to what are deemed to be gaming and wagering contracts in stock or shares, see Article 70, Illustration 7.

## Article 67.

NO REMUNERATION IN CASES OF MISCONDUCT OR  
BREACH OF DUTY.

No agent is entitled to remuneration—

- (a) in respect of any unauthorized transaction not ratified by the principal (*r*);
- (b) in respect of any transaction entered into by him in violation of the duties arising from the fiduciary character of the relationship between him and the principal, even if the transaction is adopted by the principal (*s*);
- (c) where he has been guilty of wilful breach of duty or misconduct in the course of the agency (*t*); or
- (d) where the principal derives no benefit from his services, in consequence of his negligence or other breach of duty (*u*).

(*r*) Illustrations 1 to 4. *Toppin v. Healey*, 1863, 11 W. R. 466; *Gillow v. Aberdare*, 1893, 9 T. L. R. 12, C. A.; *Kay v. Fenwick*, 1876, 1 C. P. D. 745, C. A. And see *Beaumont v. Boulbee*, 1805, 11 Ves. 358; 4 R. R. 244. As to ratification, see Article 30, Illustration 12.

(*s*) Illustration 5. *Etna Insurance Co., Re Owens*, 1873, 7 Ir. B. Eq. 235, 424; *Gray v. Haig*, 1854, 20 Beav. 219; 109 R. R. 396.

(*t*) Illustrations 5 to 8. *White v. Chapman*, 1815, 1 Stark. 113; *Hurst v. Holding*, 1810, 3 Taunt. 32; 12 R. R. 587; *Palmer v. Goodwin*, 1862, 13 Ir. Ch. R. 171; *Re Hereford Waggon Co.*, 1876, 2 Ch. D. 621; 45 L. J. Ch. 461, C. A.

(*u*) Illustrations 9 to 11. *Money Penny v. Hartland*, 1824, 1 C. & P. 352; *Duncan v. Blundell*, 1820, 3 Stark. 6.

*Illustrations.*

1. A. is employed on commission to procure a loan upon certain terms. Before anything is done the principal varies the terms. A. is unable to procure the loan on the terms as varied, but obtains an offer on the original terms, which the principal refuses to accept. A. is not entitled to any commission (*x*).

2. An agent is employed on commission to sell certain property. His authority is revoked by the death of the principal, but he subsequently sells the property, and the principal's executors confirm the sale. The agent is not entitled to recover the agreed commission from the executors unless they ratify and recognize the terms of his employment, but he may be entitled to a *quantum meruit* (*y*).

3. A solicitor is retained by the managing partner of a firm to recover a partnership debt. Pending the action commenced for that purpose, two dormant partners retired, but no notice of the retirement was given to the solicitor. It was held that, the contract on the retainer being to conduct the action to its termination unless abandoned for good cause, and no notice having been given by the retiring partners not to continue the action on their behalf, they were liable to the solicitor for the costs incurred subsequently to the date of the retirement (*z*).

4. An auctioneer, who is employed to sell property by auction, sells it by private contract. He is not entitled to commission (*a*).

5. An agent, who is employed to sell certain lands, sells it to a company in which he is a director and large shareholder. He is not entitled to commission upon the sale, even

(*x*) *Toppin v. Healey*, 1863, 11 W. R. 466.

(*y*) *Campanari v. Woodburn*, 1854, 24 L. J. C. P. 13; 15 C. B. 400; 100 R. R. 406.

(*z*) *Court v. Berlin*, (1897) 2 Q. B. 396; 66 L. J. Q. B. 714, C. A.

(*a*) *Marsh v. Jelf*, 1862, 3 F. & F. 234.

if it be adopted and confirmed by the principal (*b*). So, if an agent for sale fraudulently takes a secret commission from the purchaser, he is not only accountable to the principal for such secret commission, but is not entitled to remuneration from the seller, and if the seller pays him commission in ignorance of the facts, he is entitled to recover it back again (*c*).

6. A solicitor, having undertaken the conduct of a suit, abandons it without reasonable cause, or without giving his client reasonable notice of his intention to do so. He is not entitled to recover any costs, even for the work already done (*d*). So, a solicitor cannot recover his costs for conducting a suit, unless he has given the client the benefit of his personal judgment and superintendence (*e*). So, where a solicitor and confidential agent neglected to keep regular and proper accounts, he was deprived of his costs and charges (*f*).

7. A shipmaster is guilty of habitual drunkenness, or other wilful misconduct, during his employment. He thereby forfeits his wages (*g*).

8. An auctioneer, employed to sell property on the terms that he should be paid a certain commission and out-of-pocket expenses, received discounts from printers and ad-

(*b*) *Salomans v. Pender*, 1865, 3 H. & C. 639; 34 L. J. Ex. 95.

(*c*) *Andrews v. Ramsay*, (1903) 2 K. B. 635; 72 L. J. K. B. 865. And see *Price v. Metropolitan House Investment, &c. Co.*, 1907, 23 T. L. R. 630, C. A.

(*d*) *Whitehead v. Lord*, 1852, 7 Ex. 691; 21 L. J. Ex. 239; 86 R. B. 797; *Nicholls v. Wilson*, 1843, 11 M. & W. 106; 12 L. J. Ex. 266; 63 R. B. 523; *Van Sandau v. Browne*, 1832, 9 Bing. 402; 2 L. J. C. P. 34; 35 R. B. 571; *Underwood v. Lewis*, (1894) 2 Q. B. 306; 64 L. J. Q. B. 60, C. A.

(*e*) *Hopkinson v. Smith*, 1822, 1 Bing. 13; 25 R. B. 571.

(*f*) *White v. Lincoln*, 1803, 8 Ves. 363; 7 R. B. 71. *Comp. Re Lee, Ex p. Neville*, 1868, L. R. 4 Ch. 43.

(*g*) *The Macleod*, 1880, 5 P. D. 254; *The Dunmore*, 1875, 32 L. T. 340; *The Roebuck*, 1874, 31 L. T. 274; *The Atlantic*, 1863, 7 L. T. 647.

vertisers, and charged the principal in full without deducting the discounts. The auctioneer did not act fraudulently, but in the honest belief that he was entitled to retain the discounts. It was held that, though he must account for the discounts, he was entitled to commission, as he had not acted fraudulently (*h*). So, where a commission agent fraudulently overcharged his principal in respect of some transactions, but acted honestly in other separate and distinct transactions, it was held that he was entitled to commission on the transactions in which he had acted honestly (*i*).

9. A broker is employed to negotiate a contract for the hire of a vessel. The contract goes off in consequence of his negligence or default. He is not entitled to recover any remuneration, or even the expenses incurred by him (*k*). If an agent performs his duties in so slovenly a manner that no benefit results from his services, he is not entitled to any remuneration whatever (*l*).

10. An auctioneer, who was employed to sell an estate, negligently omitted to insert in the conditions a certain proviso usually inserted therein, and in consequence of the omission the sale was rendered nugatory. Held, that he was not entitled to any compensation or remuneration for his services although the particulars of the sale had been submitted to the principal, and were not objected to by him (*m*).

11. A solicitor, who was retained to prosecute an appeal, neglected to see that the appeal was duly entered, and failed to give notice thereof, as required by statute. At the subsequent sessions the justices refused to entertain the appeal. Held, that the solicitor was not entitled to recover any

(*h*) *Hippisley v. Kneec*, (1905) 1 K. B. 1; 74 L. J. K. B. 68.

(*i*) *Nitedals Taendstikfabrik v. Bruster*, (1906) 2 Ch. 671; 75 L. J. Ch. 798.

(*k*) *Dalton v. Irwin*, 1830, 4 C. & P. 289.

(*l*) *Hamond v. Holiday*, 1824, 1 C. & P. 384; *Hill v. Featherstonhaugh*, 1831, 7 Bing. 569; 33 R. R. 576.

(*m*) *Denew v. Daverell*, 1813, 3 Camp. 451.

costs (*n*). So, if a solicitor, in conducting a suit, commits a negligent act whereby all the previous steps become useless in the result, he cannot recover costs for any part of the work done (*o*); and, generally, in the taxation of costs as between solicitor and client, the taxing master ought to disallow any costs occasioned by the negligence or ignorance of the solicitor (*p*).

Sect 2.—*Rights of Reimbursement and Indemnity.*

Article 68.

INDEMNITY FROM ALL LIABILITIES, AND REIMBURSEMENT OF ALL EXPENSES, INCURRED IN COURSE OF AGENCY.

Subject to the provisions of Articles 69 and 70, every agent has a right against his principal, founded upon an implied contract, to be indemnified against all losses and liabilities, and to be reimbursed all expenses, incurred by him in the execution of his authority (*q*); and where the agent

(*n*) *Huntley v. Bulwer*, 1839, 6 Bing. N. C. 111; 54 R. R. 747. See also *Long v. Orsi*, 1856, 26 L. J. C. P. 127; 18 C. B. 610; 107 R. R. 432.

(*o*) *Bracey v. Carter*, 1840, 12 Ad. & E. 373; 54 R. R. 575; *Stokes v. Trumper*, 1855, 2 Kay & J. 232; 110 R. R. 201; *Cox v. Leech*, 1857, 26 L. J. C. P. 125; 1 C. B. N. S. 617; 107 R. R. 827; *Shaw v. Arden*, 1832, 2 L. J. C. P. 1; 9 Bing. 287; 35 R. R. 526.

(*p*) *Re Massey and Carey*, 1884, 26 Ch. Div. 459; 53 L. J. Ch. 705, C. A.; *Thwaites v. Mackerson*, 1828, 3 C. & P. 341; *Black v. Creighton*, 1828, 2 Moll. 552; *Re Clarke*, 1851, 1 De G. M. & G. 43; 91 R. R. 24; 21 L. J. Ch. 20; *Alsop v. Oxford*, 1833, 2 L. J. Ch. 174; 1 Myl. & K. 564; 36 R. R. 380.

(*q*) Illustrations 1 to 10. *Thacker v. Hardy*, 1878, 4 Q. B. D. 685; 48 L. J. Q. B. 289, C. A.; *Toplis v. Grane*, 1839, 5 Bing. N. C. 636; 50 R. R. 814; *Campbell v. Larkworthy*, 1894, 9 T. L. R. 528, C. A.;



is sued for money due to his principal, he has a right to set off the amount of any such losses, liabilities, or expenses (*r*).

An agent who makes advances to his principal has a right of action, as well as a lien, for such advances, provided that a *del credere* agent cannot sue for advances which are covered by sums due to the principal the payment whereof he has guaranteed (*s*).

#### *Illustrations.*

1. A. employs B. to find a purchaser for certain bark. C. agrees with B. to purchase the bark, subject to its turning out equal to sample. B., being offered a *del credere* commission by A., accepts A.'s draft for the price of the bark, and in due course pays the amount of the draft. C. then refuses the bark as not being equal to sample. B. is entitled to recover from A. the amount of the draft paid by him (*t*).

2. A. instructs B., a stockbroker, to buy and sell various shares and stock, intending to receive or pay the differences. B. is entitled to recover the amount of any losses paid by him at A.'s request in respect of such shares or stock, although he did not make separate contracts on behalf of A., but appropriated to him portions of larger amounts of shares and stock, which he bought as principal with a view of dividing it amongst various clients for whom he was acting (*u*).

*Pawle v. Gunn*, 1838, 7 L. J. C. P. 206; 4 Bing. N. C. 445; 44 R. R. 755. And see Article 69, and Illustrations thereto.

(*r*) Illustrations 9 and 10. *Alsager v. Currie*, 1844, 13 L. J. Ex. 203; 12 M. & W. 751; 67 R. R. 475. See also note to Article 54.

(*s*) *Graham v. Ackroyd*, 1852, 22 L. J. Ch. 1046; 10 Hare, 192.

(*t*) *Hooper v. Treffrey*, 1847, 1 Ex. 17; 16 L. J. Ex. 233; 74 R. R. 578. Comp. *Simpson v. Swun*, 1812, 3 Camp. 291; 13 R. R. 805.

(*u*) *Ex p. Rogers, Re Rogers*, 1880, 15 Ch. Div. 207, C. A. See also

3. A. purchased shares as a broker, not being duly licensed to act in that capacity. Held, that he was entitled to recover from the principal the price of the shares, which he was compelled to pay, such payment not being an essential part of the duty of a broker, although, in consequence of not being licensed, he could not recover any commission or remuneration (*x*).

4. A stockbroker incurs liabilities on the Stock Exchange on behalf of his principal. The stockbroker subsequently pays a composition on the amount of his debts (including such liabilities), and by a rule of the Stock Exchange he cannot be sued for the balance of such debts without the permission of the Committee. The principal is bound to indemnify him to the full extent of the liabilities incurred on his behalf. The implied contract to indemnify an agent extends to all liabilities incurred by him, not merely to actual losses (*y*).

5. An auctioneer is instructed to sell certain property, and after he has contracted liabilities in reference to his employment, his authority is revoked by the principal. The principal must indemnify him against the liabilities (*z*).

6. An agent incurs damages and expenses in defending an action on behalf of his principal. He is entitled to reimbursement of such damages and expenses if he was acting within the scope of his authority in defending the action, and the loss was not caused by his own default (*a*). Where an

*May v. Angeli*, 1898, 14 T. L. R. 551, H. L.; Article 39, Illustration 10. Comp. *Skelton v. Wood*, 1895, 71 L. T. 616.

(*x*) *Smith v. Lindo*, 1858, 27 L. J. C. P. 335; 5 C. B. N. S. 587; 116 R. R. 780, Ex. Ch.

(*y*) *Lacey v. Hill, Crowley's claim*, 1870, L. R. 18 Eq. 182; 43 L. J. Ch. 551.

(*z*) *Warlow v. Harrison*, 1858, 1 El. & El. 295, 309; 117 R. R. 219, Ex. Ch.; *Brittain v. Lloyd*, 1845, 15 L. J. Ex. 43; 14 M. & W. 762; 69 R. R. 816.

(*a*) *Frixione v. Tagliaferro*, 1855, 10 Moo. P. C. C. 175, P. O.; *Re*

agent, exercising his best judgment, compromised an action brought against him in respect of a contract made on behalf of the principal, who had notice of the action, and had not given any instructions as to the course to be pursued, it was held that the agent was entitled to indemnity, although the plaintiff could not, under the circumstances, have succeeded in the action (*b*).

7. An auctioneer in Paris was instructed by A., in London, to advertise for sale a thoroughbred mare, entered and described in the English Stud Book under the name of Pentecost. The auctioneer advertised accordingly, and a Frenchman, who owned a mare of the same name, sued and recovered damages from him in France, in respect of injury the plaintiff alleged had been suffered, in consequence of A.'s mare having been advertised by the same name. It was held that A. was not liable to indemnify the auctioneer against the loss, because, the description in the advertisement being a true description, the loss could not be said to have been incurred in consequence of any act of the auctioneer in pursuance of his employment, but in consequence of the erroneous decision of the French Court (*c*).

8. An accommodation bill is drawn and accepted for the purpose of raising money for the benefit of the drawer and acceptor. The drawer instructs a bill broker to get the bill discounted. It is the common practice for bill brokers to give a general guarantee to the bankers who discount their bills, and not to indorse each bill discounted on behalf of their customers. The bill is dishonoured, and the broker becomes liable to the bankers upon such a guarantee. The

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*Wells*, 1895, 72 L. T. 359; *The Jones Seddon*, 1866, L. R. 1 Ad. 62; 35 L. J. Ad. 117; *Williams v. Lister*, 1913, 109 L. T. 699, C. A. See also *Re Famatina Development Corpn.*, (1914) 2 Ch. 271; 84 L. J. Ch. 48, C. A.

(*b*) *Pettman v. Keble*, 1850, 19 L. J. C. P. 325; 9 C. B. 701. See also *Broom v. Hall*, 1859, 7 C. B. N. S. 503.

(*c*) *Halbroun v. International Horse Agency*, (1903) 1 K. B. 270; 72 L. J. K. B. 90. But *quære* whether this decision is sound. See *Williams v. Lister* and *Re Famatina Development Corpn.*, *supra*.

broker is entitled to recover from the acceptor the amount that he is compelled to pay in pursuance of such guarantee, with interest, it being a liability incurred in the execution of his authority in the ordinary course of his business as a bill broker (*d*).

9. A broker, in accordance with a reasonable custom of the particular market in which he was employed, rendered himself personally responsible for the price of goods bought on behalf of his principal, and subsequently duly paid for the goods. Held, that he was entitled to set off the amount so paid, in an action by the principal's trustee in bankruptcy for money due to the principal (*e*).

10. An agent, who had general authority to receive and sell goods on behalf of the principal, in good faith brought an action against a third person who wrongfully withheld possession of the goods. In an action by the principal for the proceeds of the goods it was held that the agent was entitled to set off the amount of the costs incurred by him in the proceedings to recover the goods (*f*).

#### Article 69.

##### LIABILITIES INCURRED UNDER RULES OR USAGES OF PARTICULAR MARKETS.

Where an agent is authorized to deal at a particular place, or in a particular market, he is entitled to be indemnified by the principal against all losses and liabilities, and to be reimbursed all expenses, incurred by him in the execution of his authority under the rules or regulations, or accord-

(*d*) *Ex p. Bishop, Re Fox*, 1880, 15 Ch. Div. 400; 50 L. J. Ch. 18, C. A.

(*e*) *Cropper v. Cook*, 1868, L. R. 3 C. P. 194. *Comp. Morris v. Cleasby*, 1816, 4 M. & S. 566; 14 R. R. 531.

(*f*) *Curtis v. Barclay*, 1826, 5 B. & C. 141

ing to the customs or usages, of that place or market (*g*). Provided, that no principal incurs any liability in consequence of any unreasonable rule, regulation, custom, or usage, unless he had notice thereof at the time when he conferred the authority on the agent (*h*).

### *Illustrations.*

1. A. authorized B., a broker in Liverpool, to sell certain shares. B. sold the shares to C., who was also a broker. A. failed to deliver the shares, and B. therefore bought some on the market and completed the contract with C. By the usage of Liverpool, of which A. had knowledge, it was customary for brokers to render themselves personally liable when contracting with each other. Held, that A. was liable to B. for the loss incurred by him in completing the contract (*i*).

### *Usages of the Stock Exchange.*

2. A. employs B., a stockbroker, to purchase shares on the Stock Exchange. B. purchases the shares, and is compelled to refund to the seller the amount of a "call" which the latter had to pay in order to enable him to transfer the shares. A. must indemnify B. (*k*).

(*g*) Illustrations 1 to 13. *Sentance v. Hawley*, 1863, 13 C. B. N. S. 458; *Harker v. Edwards*, 1887, 57 L. J. Q. B. 147, C. A.; *Sutton v. Tatham*, 1839, 10 Ad. & E. 27; 8 L. J. Q. B. 210; 50 R. R. 312; *Stock Advance Co. v. Galmoye*, 1887, 3 T. L. R. 808, C. A. See also Article 39, and Illustrations.

(*h*) Illustrations 11 and 12. *Blackburn v. Mason*, 1893, 68 L. T. 510, C. A.; *Robinson v. Mollett*, 1874, L. R. 7 H. L. 802; 44 L. J. C. P. 362. See also Article 39, and Illustrations.

(*i*) *Bayliffe v. Butterworth*, 1847, 1 Ex. 425; 74 R. R. 702; *Johnston v. Osborne*, 1841, 11 A. & E. 549; 52 R. R. 445. And see *Pollock v. Stables*, 1848, 12 Q. B. 765; 17 L. J. Q. B. 352; 76 R. R. 419.

(*k*) *Bayley v. Wilkins*, 1849, 7 C. B. 886; 18 L. J. C. P. 273; 78 R. R. 849.

3. A. employs B. to sell stock subject to the rules of the Stock Exchange. B. sells the stock, and it is transferred to the buyer. It is afterwards discovered that the signature on the transfer is a forgery, and the Committee of the Stock Exchange decide that, according to the rules, B. must replace the stock. The rule is a reasonable one, and A. must indemnify B., whether he was aware of the rule or not (*l*).

4. A. employs B., a stockbroker, to purchase, for the next settling day, shares in a certain bank. Before the settling day the bank stops payment and goes into liquidation. A. gives notice to B. not to pay for the shares. B. nevertheless pays for them, he being bound to do so by the rules of the Stock Exchange. A. must indemnify B. even if the directors of the bank refuse to consent to a transfer of the shares (*m*).

5. A. employs B., a stockbroker, to purchase shares in a certain company. On settling day A. gives B. the name of an infant transferee, to whom the shares are transferred. The company is subsequently wound up, and the name of the infant is struck out and that of the transferor substituted as a contributory. The Stock Exchange Committee order B. to indemnify the transferor, and B. does so. A. must indemnify B. (*n*).

6. A. employs B., a stockbroker, to buy, for next settling day, shares in a certain company. Before the settling day the company is being wound up under a statute which provides that every transfer of shares after the commencement of the winding-up shall be void unless the Court otherwise orders. B. pays for and takes a transfer of the shares on settling day, in accordance with the rules of the Stock

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(*l*) *Reynolds v. Smith*, 1893, 9 T. L. R. 474, H. L.; affirming *Smith v. Reynolds*, 66 L. T. 808. C. A.

(*m*) *Taylor v. Stray*, 1857, 26 L. J. C. P. 287; 2 C. B. N. S. 175, 197; 109 R. R. 653, Ex Ch.; *Murten v. Gibbon*, 1875, 33 L. T. 561, C. A.; *Hunt v. Chamberlain*, 1896, 12 T. L. R. 186, C. A.; *Walter v. King*, 1897, 13 T. L. R. 270. C. A.

(*n*) *Peppercorne v. Cleuch*, 1872, 26 L. T. 656.

Exchange. A. must indemnify B. (o). So, where, under similar circumstances, a broker contracts to sell shares, and by reason of the refusal of the principal to execute a transfer, is compelled to buy other shares at a higher price, in order to carry out the contract, the principal is bound to indemnify the broker against the loss (p).

7. A. employs B., a stockbroker, to purchase shares. B. purchases the shares, but the transfer, in consequence of the winding-up of the company, cannot be registered. B. is compelled to indemnify the seller against "calls," according to the rules of the Stock Exchange. A. must indemnify B. (q).

8. A., a stockbroker, by B.'s instructions, buys 70 shares for special settlement. Only 20 of the shares are delivered in time according to the rules of the Stock Exchange, and A. pays for them. By the usage of the Stock Exchange a buyer is bound to accept and pay for a partial delivery, which is valid *pro tanto*. The usage is reasonable, and B. must indemnify A. (r).

9. A. employs B., a stockbroker, to sell certain bonds. B. sells the bonds, and pays over the proceeds to A. The bonds are subsequently discovered to be unmarketable, and B., in accordance with the rules of the Stock Exchange, takes them back and repays the price to the purchaser. A. must repay the price to B. (s).

10. By the usage of the Stock Exchange, a broker who contracts, as such, to buy stock is justified in immediately reselling the stock in the event of the death, bankruptcy, or

(o) *Chapman v. Shepherd*, 1867, L. R. 2 C. P. 228; 36 L. J. C. P. 113.

(p) *Biederman v. Stone*, 1867, L. R. 2 C. P. 504; 36 L. J. C. P. 198.

(q) *Hodgkinson v. Kelly*, 1868, L. R. 6 E. 496; 37 L. J. Ch. 837.

(r) *Benjamin v. Barnett*, 1903, 19 T. L. R. 564.

(s) *Young v. Cole*, 1837, 3 Bing. N. C. 724; 6 L. J. C. P. 201; 43 R. R. 783. Comp. *Westropp v. Solomon*, 1849, 19 L. J. C. P. 1; 8 C. B. 345; 79 R. R. 530.

insolvency of the principal. A broker who so acts in such a case is entitled to recover from the principal or his representatives the amount of any loss incurred on the resale (*t*).

11. A. employs B., a stockbroker, to purchase shares in a joint stock banking company. B. purchases the shares and sends a contract note to A., in which the numbers of the shares are not inserted as required by Leeman's Act (30 Vict. c. 29), the contract, therefore, being void in law. Before the settling day, A. repudiates the contract. B. nevertheless duly completes the contract, and pays for the shares, to avoid being declared a defaulter and expelled from the Exchange, it being the usual custom for members of the Stock Exchange to ignore Leeman's Act. If A. had notice of the custom when he employed B., he must indemnify B. (*u*). But if A. had no notice of the custom, and was not aware that, by the rules of the Exchange, B. was bound to complete such a contract, though it was void in law (*x*), or if he knew neither of Leeman's Act nor of the custom (*y*), he is not bound to indemnify B., because the custom is an unreasonable one.

12. A. instructs B., his broker, to carry over certain stock to the next settlement, but fails, after receiving due notice of the amount, to pay on the current pay day the balance due for differences, or to place sufficient security at B.'s disposal. By the usage of the Stock Exchange, a broker may in such a case close the principal's account. B. closes A.'s account, according to usage, and sues him for the losses. The usage is reasonable, and A. must indemnify B., whether

(*t*) *Lacey v. Hill, Crowley's claim*, 1870, L. R. 18 Eq. 182; 43 L. J. Ch. 551; *Scrimgeour's claim*, 1870, L. R. 8 Ch. 921; 42 L. J. Ch. 657, Ch. App.; *Re Overweg, Haas v. Durant*, (1900) 1 Ch. 209; 69 L. J. Ch. 255.

(*u*) *Seymour v. Bridge*, 1885, 14 Q. B. D. 460; 54 L. J. Q. B. 347.

(*x*) *Perry v. Barnett*, 1885, 15 Q. B. D. 388; 54 L. J. Q. B. 466, O. A.

(*y*) *Coates v. Pacey*, 1892, 8 T. L. R. 474, C. A.



he had notice of the usage or not (*z*). But a broker is not entitled in such a case to close some of the transactions and keep others open, in his discretion, because that would in effect be speculating on his own behalf (*a*). Where, however, a broker informed his principal that he would not be able to carry over shares bought on his account, and the principal said that he could not find the money to take them up, it was held that the broker was justified in carrying over as many of the transactions as he could and closing the others (*b*).

13. A., a stockbroker, is instructed by B. to buy shares. A. buys the shares, but B. fails to carry out the contract, and A. has to pay for them. A. has a fair price fixed by a jobber, and goes through the form of selling the shares and buying them back again on his own account. The price being fair, and having been fixed at a reasonable time, it is immaterial that A. bought the shares back on his own account, and B. must indemnify A. against the loss (*c*) subject to a deduction of any profit A. may have made by reason of the sale and re-purchase having been effected in one transaction (*d*).

(*z*) *Davis v. Howard*, 1890, 24 Q. B. D. 691; 59 L. J. Q. B. 133; *Druce v. Levy*, 1891, 7 T. L. R. 259.

(*a*) *Samuel v. Rowe*, 1892, 8 T. L. R. 488; *Hogan v. Shaw*, 1889, 5 T. L. R. 613, C. A.

(*b*) *Cullum v. Hodges*, 1901, 18 T. L. R. 6, C. A.

(*c*) *Macoun v. Erskine*, (1901) 2 K. B. 493; 70 L. J. K. B. 973, C. A.; *Walter v. King*, 1897, 13 T. L. R. 270, C. A.; *Re Finlay*, (1913) 1 Ch. 564; 82 L. J. Ch. 295, C. A.

(*d*) *Erskine v. Sachs*, (1901) 2 K. B. 504; 70 L. J. K. B. 978, C. A.

## Article 70.

NO INDEMNITY OR REIMBURSEMENT IN RESPECT OF UNLAWFUL, WAGERING, OR UNAUTHORIZED TRANSACTIONS, OR OF LIABILITIES OR EXPENSES INCURRED IN CONSEQUENCE OF OWN DEFAULT.

No agent is entitled to indemnity against any losses or liabilities, or reimbursement of any expenses incurred by him—

- (a) in respect of any transaction which is obviously, or to his knowledge, unlawful (*e*);
- (b) in respect of any gaming or wagering contract or agreement rendered null and void by the Gaming Act, 1845 (*f*);
- (c) in respect of any unauthorized act or transaction not ratified by the principal (*g*);
- (d) in consequence of any act of his own which is obviously, or to his knowledge, unlawful (*h*); or

(*e*) Illustrations 1 to 5. *Shackell v. Rosier*, 1836, 5 L. J. C. P. 193; 2 Bing. N. C. 634; 42 R. R. 666; *Scott v. Brown*, (1892) 2 Q. B. 724; 61 L. J. Q. B. 738, C. A.; *Smith v. Clinton*, 1909, 99 L. T. 840 (libel).

(*f*) 8 & 9 Vict. c. 109; 55 Vict. c. 9. Illustrations 6 and 7. *Levy v. Warburton*, 1901, 70 L. J. K. B. 708.

(*g*) Illustrations 8 to 13. *Frixione v. Tagliaferro*, 1856, 10 Moo. P. C. C. 175, P. C.; *Coates v. Pacey*, 1892, 8 T. L. R. 474, C. A.; *Service v. Bain*, 1893, 9 T. L. R. 95, C. A.; *Re Overweg*, *Haas v. Durant*, (1900) 1 Ch. 209; 69 L. J. Ch. 255.

(*h*) Illustrations 1 to 5. *Merryweather v. Nixan*, 1799, 8 T. B. 186; 16 R. B. 810.

(e) in consequence of his own negligence, default, insolvency, or breach of duty (i).

### *Illustrations.*

1. An agent expends money on behalf of his principal in purchasing shares in a company which affects to act as a body corporate without authority by charter or statute, and which is, therefore, an illegal company. The agent is not entitled to recover from the principal the amount so expended, because the transaction is obviously unlawful (k).

2. A broker effects an illegal insurance on behalf of his principal, and pays the premium thereon. The broker is not entitled to recover from the principal the amount of the premium, or any other payments made by him in respect of such insurance (l). Nor is a broker or other agent entitled to reimbursement or indemnity in respect of any contract of marine insurance which is not contained in a duly stamped policy (m).

3. An election agent makes payments which are illegal under the Corrupt Practices Acts. He cannot recover the amount of any such payments from the candidate employing him (n).

4. A. employs B. to purchase smuggled goods. B. purchases the goods and pays for them. B. cannot recover

(i) Illustrations 14 to 17. *Toplis v. Grane*, 1839, 5 Bing. N. C. 636; 50 E. R. 814; *Simpson v. Swan*, 1812, 3 Camp. 291; 13 R. B. 805; *Frixione v. Tagliaferro*, 1856, 10 Moo. P. C. C. 175, P. C.; *Skyring v. Greenwood*, 1825, 4 B. & C. 281; 28 R. R. 264; *Davison v. Fernandes*, 1890, 6 T. L. R. 73.

(k) *Josephs v. Pebrer*, 1825, 3 B. & C. 639.

(l) *Allkins v. Jupe*, 1877, 2 C. P. D. 375; 46 L. J. C. P. 824; *Ex p. Muther*, 1797, 3 Ves. 373.

(m) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 97.

(n) *Re Parker*, 1882, 21 Ch. D. 408; 52 L. J. Ch. 159, C. A.

the price from A., even if A. obtains possession of the goods (*o*).

5. A. instructs B., an auctioneer, to sell certain goods of which A. has no right to dispose, B. having no knowledge of any defect in A.'s title. B. sells the goods, and duly pays over the proceeds to A. B. is afterwards compelled to pay to the true owner the value of the goods. A. must indemnify B., the transaction not being obviously, or to B.'s knowledge, unlawful (*p*). The rule that a tortfeasor cannot recover upon either an express or implied promise of indemnity by the person at whose request or on whose behalf the tort is committed, is confined to cases where the tortious act is obviously unlawful, and does not apply when there is a *bonâ fide* doubt about the matter (*q*).

6. A. makes a bet with B., and loses. C., at A.'s request and on his behalf, pays B. the amount of the bet. C. cannot recover the amount from A. (*r*), in consequence of the Gaming Act, 1892 (55 Vict. c. 9), which provides that any contract, express or implied, to pay any person any sum paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, shall be null and void, and no action shall be brought or maintained to recover any such sum. Gaming and wagering contracts are not unlawful, but merely void, and prior to the Act of 1892 it was held that money paid by an agent in pursuance of such a contract was recoverable from the principal, even if he had repudiated the transaction before the money was actually paid, the agent being entitled to be indemnified against the moral liability incurred by him in executing

(*o*) *Ex p. Mather*, 1797, 3 Ves. 373.

(*p*) *Adamson v. Jarvis*, 1827, 4 Bing. 66; 29 R. R. 503.

(*q*) *Betts v. Gibbins*, 1834, 4 L. J. K. B. 1; 2 A. & E. 57; 41 R. R. 381; *Cory v. Lambton*, 1917, 85 L. J. K. B. 401, C. A.

(*r*) *Tatum v. Reeve*, (1893) 1 Q. B. 44; 62 L. J. Q. B. 30. And see *Gasson v. Cole*, 1910, 26 T. L. R. 468.

his authority (s). So, it was held that a plea of "gaming and wagering" was no answer to an action by a stockbroker for differences paid on his client's behalf (t).

7. A., intending to speculate, employs a broker to buy and sell stock on the Stock Exchange, the broker being aware that A. does not intend to accept the stock bought, or deliver the stock sold, on his behalf, but expects the broker to arrange that only differences shall be paid or received. The broker makes the contracts on A.'s behalf, and becomes personally liable on them. The broker is entitled to indemnity, because the transactions entered into by him are real contracts for the purchase and sale of stock, and not gaming or wagering contracts (u). Otherwise, if the broker had agreed with the persons with whom he contracted, or it had been the intention of the parties, that only the differences should be paid or received (x). If both parties to a contract intend that no stock or shares shall be delivered, but only differences paid or received, it is none the less a wagering contract because there is a provision that either party may in his option require completion (y). On the

(s) *Read v. Anderson*, 1884, 13 Q. B. D. 779; 53 L. J. Q. B. 532, C. A. (bets paid by a turf commission agent). The Act is not retrospective: *Knight v. Lee*, (1893) 1 Q. B. 41; 62 L. J. Q. B. 28.

(t) *Rosewarne v. Billing*, 1863, 33 L. J. C. P. 55; 15 C. B. N. S. 316; *Hannan v. Beeton*, 1889, 5 T. L. R. 703, C. A.

(u) *Thacker v. Hardy*, 1878, 4 Q. B. D. 685; 48 L. J. Q. B. 289, C. A.; *Forget v. Ostigny*, (1895) A. C. 318; 64 L. J. P. C. 62, P. C.; *Re Hewett, Ex p. Paddon*, 1893, 9 T. L. R. 166, C. A.; *Ex p. Phillips*, 1861, 30 L. J. Bky. 1; *Ex p. Marnham*, 1861, 30 L. J. Bky. 3; *Lightbody v. Rahbula*, 1895, 12 T. L. R. 102; *Franklin v. Dawson*, 1913, 29 T. L. R. 479. As to the validity of options, see *Buitenlandsche Bankvereeniging v. Hildensheim*, 1903, 19 T. L. R. 641, C. A.; *Sadd v. Foster*, 1897, 13 T. L. R. 207, C. A. And see *Hirst v. Williams*, 1895, 12 T. L. R. 128, C. A.

(x) *Grizewood v. Blane*, 1851, 11 C. B. 526, 538; *Universal Stock Exchange v. Strachan*, (1896) A. C. 166; 65 L. J. Q. B. 429, H. L.; *Re Gieve*, (1899) 1 Q. B. 794; 68 L. J. Q. B. 509, C. A.; *Philip v. Bennett*, 1901, 18 T. L. R. 129; *Wood v. Fevez*, 1898, 14 T. L. R. 492.

(y) *Universal Stock Exchange v. Strachan, supra*; *Re Gieve, supra*;

other hand, if either party intends that stock or shares shall be delivered and paid for, the contract is not a wagering contract, even if it provides for the payment of an enhanced price in the event of the stock or shares being taken up (*z*).

8. A. authorizes B., a broker, to effect a marine insurance policy. After the underwriters have signed the slip, but before a binding contract is made, A. revokes B.'s authority. B., nevertheless, effects the policy, and pays the premiums. B. cannot recover the premiums from A., having acted without authority (*a*). In consequence of the Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 93, 96 & 97, a contract of marine insurance does not become binding, at law or in equity, until the policy is subscribed by the underwriters (*a*). But a contract of fire insurance is complete and binding immediately the underwriters initial the slip (*b*).

9. A. authorizes B. and C. to insure his life in their names. They insure in the names of B., C., and D., and pay the premiums. They are not entitled to recover the amount of the premiums from A., not having strictly pursued their authority (*c*).

10. A., a broker, contracted on behalf of B. to sell certain shares to C. In consequence of the non-delivery of the shares, C. bought against B., without having tendered a transfer to him, and A. paid C. the difference, although B. had given him express notice not to do so. Held, that C. could not have recovered the difference until a transfer had been tendered by him, and that as A. had paid the amount without B.'s authority, he was not entitled to indemnity.

(*z*) *Philip v. Bennett*, 1901, 18 T. L. R. 129.

(*a*) *Warwick v. Slade*, 1811, 3 Camp. 127; 13 R. R. 772; *Fisher v. Liverpool Ins. Co.*, 1874, L. R. 9 Q. B. 418; 43 L. J. Q. B. 114, Ex. Ch.; *Home Marine Ins. Co. v. Smith*, (1898) 2 Q. B. 351; 67 L. J. Q. B. 777.

(*b*) *Thompson v. Adams*, 1889, 23 Q. B. D. 361.

(*c*) *Barron v. Fitzgerald*, 1840, 6 Bing. N. C. 201; *Service v. Bain*, 1893, 9 T. L. R. 95, C. A.

from B. Otherwise, if the payment had been made in discharge of a liability incurred by A. (*d*).

11. A., a stockbroker, by B.'s instructions, buys 70 shares for special settlement. Owing to difficulties in connection with the transfer, only 20 of the shares are delivered in time according to the rules of the Stock Exchange. The Committee resolve that A. is to pay for the other 50 shares when delivered, and A. accordingly takes delivery and pays for them. B. is not liable to indemnify A., the shares not having been delivered in accordance with the contract (*e*). The Committee of the Stock Exchange have no power to alter a contract so as to bind non-members (*f*).

12. A., an outside broker, being instructed by B. to buy and sell various stocks, without B.'s consent appropriates to B.'s account certain stocks held by himself, and from time to time sells and repurchases other stocks bought by him on B.'s behalf. A. is not entitled to recover from B. any differences in respect of the stocks so appropriated or dealt with without his consent (*g*). So, where a broker, besides charging commission, added a small percentage to the contract prices, it was held that the principal was entitled to repudiate the transactions, and not merely to an allowance of the overcharges, because the broker had not in fact made the contracts in respect of which indemnity was claimed, but had made other contracts at different prices (*h*).

13. A. draws a cheque on his banker. The amount of the

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(*d*) *Bowlby v. Bell*, 1846, 16 L. J. C. P. 18; 3 C. B. 284; *Howard v. Trucker*, 1831, 1 B. & Ad. 712; 35 R. R. 418.

(*e*) *Benjamin v. Barnett*, 1903, 19 T. L. R. 564.

(*f*) *Ib.*; *Union Corp. v. Charrington*, 1902, 8 Com. Cas. 99.

(*g*) *Skelton v. Wood*, 1895, 71 L. T. 616.

(*h*) *Stange v. Lowitz*, 1898, 14 T. L. R. 498, C. A.; *Johnson v. Kearley*, (1908) 2 K. B. 514; 77 L. J. K. B. 904, C. A.; *Nicholson v. Mansfield*, 1901, 17 T. L. R. 259; *Thompson v. Meade*, 1891, 7 T. L. R. 698. *Comp. Stubbs v. Slater*, (1910) 1 Ch. 632; 79 L. J. Ch. 420, C. A.; *Henderson v. Martin*, 1912, 46 Ir. L. T. 13; *Aston v. Kelsey*, (1913) 3 K. B. 314; 82 L. J. K. B. 817, C. A.; *Blaker v. Hawes*, 1913, 109 L. T. 320.

cheque is altered without A.'s authority, and the banker, in good faith, pays the increased amount. The banker is only entitled to charge A. with the amount for which the cheque was originally drawn (*i*), unless A. is estopped, by his negligence or otherwise, from denying the validity of the cheque as altered (*j*).

14. A solicitor undertook a prosecution for perjury, and agreed that he would only charge out-of-pocket expenses. The prosecution failed in consequence of the negligent way in which the indictment was drawn. Held, that the solicitor was not entitled to recover the disbursements (*k*). So, an agent is not entitled to be indemnified against a loss incurred by him in consequence of his own mistake on a point of law as to which he ought to have been competent (*l*).

15. A stockbroker is instructed by his principal to carry over stock to the next settlement. Before the next settling day the broker becomes insolvent and is declared a defaulter, in consequence of which the stock is sold at a loss. The principal is not bound to indemnify the broker, the loss having been caused by the broker's insolvency (*m*).

16. A stockbroker, having bought stock on the principal's

(*i*) *Colonial Bank of Australasia v. Marshall*, 1906, 75 L. J. P. C. 76, P. C.; *Hall v. Fuller*, 1826, 5 B. & C. 750; 29 R. R. 383; *Halifax Union v. Wheelwright*, 1875, L. R. 10 Ex. 183; 44 L. J. Ex. 121; *British Linen Co. v. Caledonian Ins. Co.*, 1861, 4 Macq. 107, H. L.; *Keptigalla Rubber Estates v. National Bank of India*, (1909) 2 K. B. 1010; 78 L. J. K. B. 964; *Walker v. Manchester, &c. Banking Co.*, 1913, 108 L. T. 728. As to countermanding payment of a cheque by telegram, see *Curtice v. London, &c. Bank*, (1908) 1 K. B. 293; 77 L. J. K. B. 341, C. A.

(*j*) *London Joint Stock Bank v. Macmillan*, 1918, 34 T. L. R. 509, H. L.; *Young v. Grote*, 1827, 52 L. J. C. P. 165; 29 R. R. 552.

(*k*) *Lewis v. Samuel*, 1846, 8 Q. B. 685; 15 L. J. Q. B. 218; 70 R. R. 582. See also *Thomas v. Atherton*, 1878, 10 Ch. D. 185; 48 L. J. Ch. 370, C. A.

(*l*) *Capp v. Topham*, 1805, 6 East, 392.

(*m*) *Duncan v. Hill*, *Duncan v. Beeson*, 1873, L. R. 8 Ex. 242; 42 L. J. Ex. 179, Ex. Ch.; *Allen v. Wingrove*, 1901, 17 T. L. R. 261, C. A.



behalf for the following settlement, wrongfully sold it before settling day without the principal's authority. The stock was at a higher price on settling day than when it was sold, but lower than the price at which it was bought. Held, that the broker was not entitled to indemnity, even subject to an allowance for damages for the breach of duty in selling without authority, the loss having been caused, not by any breach of contract on the part of the principal, but by the wrongful sale (*n*).

17. A broker is instructed to buy shares, and becomes a defaulter before settling day. He informs his principal that he may have the contract completed (the jobber is bound to complete in such a case if the principal wishes it), or may consider it closed at the official price at the time of the broker's default. The principal elects the latter alternative. He is bound to indemnify the broker against the loss, having ratified the closing of the transaction before settling day (*o*).

### Sect. 3.—*Right of Lien.*

#### Article 71.

#### DEFINITIONS OF PARTICULAR AND GENERAL POSSESSORY LIENS.

A possessory lien is a right of a person who has possession of goods or chattels belonging to another, to retain possession thereof until the satisfaction of some debt or obligation by the owner of the goods or chattels.

Where the right is to retain possession in respect of a general balance of account, or until the satisfaction of debts or obligations incurred indepen-

(*n*) *Ellis v. Pond*, (1898) 1 Q. B. 426; 67 L. J. Q. B. 345, C. A.

(*o*) *Hartas v. Ribbons*, 1889, 22 Q. B. D. 254, C. A.

dently of the goods or chattels subject to the right, it is called a general lien.

Where the right is confined to debts and obligations incurred in respect of the goods or chattels subject to the right, it is called a particular lien.

### Article 72.

#### POSSESSORY LIEN OF AGENTS.

Every agent has a general or particular possessory lien on the goods and chattels of his principal in respect of all lawful claims he may have as such agent against the principal, either for remuneration earned, or advances made, or losses or liabilities incurred, in the course of the agency, or otherwise arising in the course of the agency (*p*), provided—

- (1) that the possession of the goods or chattels was lawfully obtained by him in the course of the agency (*q*), and in the same capacity in which he claims the lien (*r*);
- (2) that there is no agreement inconsistent with the right of lien (*s*); and
- (3) that the goods or chattels were not delivered to him with express directions, or for a special purpose, inconsistent with the right of lien (*t*).

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(*p*) Illustrations 1 to 10.

(*q*) Illustrations 8 and 11.

(*r*) Illustrations 10, 12, 17 and 18.

(*s*) Illustrations 13 and 14. *Cowell v. Simpson*, 1809, 16 Ves. 280; 10 B. R. 181; *Bock v. Gorrisen*, 1861, 30 L. J. Ch. 39; *Crawshay v. Homfray*, 1820, 4 B. & A. 50; 22 B. R. 618.

(*t*) Illustrations 15 to 19.

The possessory lien of every agent is a particular lien only, except where he has a general lien by agreement, express or implied, with his principal (*u*). Such an agreement may be implied from a course of dealing between the principal and agent, or from an established custom or usage (*u*). Factors (*x*), insurance brokers (*y*), stockbrokers (*z*), solicitors (*a*), bankers (*b*), wharfingers (*c*), and packers (*d*), have a general lien by implication from custom.

### *Illustrations.*

1. An auctioneer is employed to sell goods at the house of the owner. The auctioneer has a lien on the goods for his charges and commission (*e*).

(*u*) *Bock v. Gorrissen*, 1861, 30 L. J. Ch. 39; *Rushforth v. Hadfield*, 1806, 7 East, 224; 8 R. R. 520; *Holderness v. Collinson*, 1827, 7 B. & C. 212; 31 R. R. 174.

(*x*) *Baring v. Corrie*, 1818, 2 B. & A. 137; 20 R. R. 383; *Godin v. London Assurance Co.*, 1758, 1 W. Bl. 103. And see Illustrations 5, 6, 10, 12 and 13.

(*y*) *Snook v. Davidson*, 1809, 2 Camp. 218; 11 R. R. 696; *Mann v. Forrester*, 1814, 4 Camp. 60; 15 R. R. 724; *Westwood v. Bell*, 1815, 4 Camp. 349; 16 R. R. 800.

(*z*) *Jones v. Peppercorne*, 1858, 28 L. J. Ch. 158; Johns. 430; *Re London and Globe Finance Corp.*, (1902) 2 Ch. 416; 71 L. J. Ch. 893; *Hope v. Glendinning*, (1911) A. C. 419; 80 L. J. P. C. 193, H. L.

(*a*) *Re Broomhead*, 1847, 16 L. J. Q. B. 355; 5 D. & L. 52; 79 R. R. 839. Illustrations 7, 10 to 12, and 19.

(*b*) *London Chartered Bank v. White*, 1879, 4 App. Cas. 413; 48 L. J. P. C. 75, P. C.; *Jourdain v. Lefevre*, 1793, 1 Esp. 66. And see Illustrations 12, 13, 15 and 18.

(*c*) *Naylor v. Mangles*, 1794, 1 Esp. 109; 5 R. R. 722; *Spears v. Hartley*, 1798, 3 Esp. 81; 6 R. R. 814.

(*d*) *Re Witt, Ex p. Shubrook*, 1876, 2 Ch. Div. 489; 45 L. J. Bk. 118, C. A.

(*e*) *Williams v. Millington*, 1788, 1 H. Bl. 81; 2 R. R. 724.

2. Books and papers are intrusted to a parliamentary agent by the clerk of the trustees of a public road, for the purpose of obtaining a renewal of their Act of Parliament. The agent has a lien on the books and papers for the amount of his bill of costs (*f*).

3. A. carries on a business in his own name as agent for B. B. becomes bankrupt. A. is liable to the creditors of the business by reason of his having carried it on in his own name. A. has a lien upon the goods and chattels in his possession belonging to B. to the extent of such liability (*g*).

4. A. carries on a business in his own name as agent for B., and deals with the possession of the goods of such business as if he were the owner thereof. A. accepts certain bills of exchange drawn by B. Both A. and B. become bankrupt. A.'s trustee in bankruptcy has a lien upon the goods in A.'s possession to the extent of A.'s liability upon current bills as well as for other amounts due to him from B. (*h*).

5. A factor accepts bills of exchange on the faith of a consignment of goods, which are duly delivered to and sold by him. The principal dies during the currency of some of the bills. The factor has a lien upon the proceeds of the goods for the amount of the bills not yet due, as well as for the amount of those which he has paid (*i*). So, a factor who becomes a surety for his principal has a lien upon the proceeds of goods sold by him, for the amount guaranteed (*k*).

6. An agent was appointed by a company to sell goods on their behalf in a shop taken for that purpose, and it was agreed that he should from time to time accept bills representing the value of the goods in his hands for sale. Goods

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(*f*) *Ridgway v. Lees*, 1856, 25 L. J. Ch. 584.

(*g*) *Foxcraft v. Wood*, 1828, 4 Russ. 487; 28 R. R. 161.

(*h*) *In re Fawcus, Ex p. Buck*, 1876, 3 Ch. Div. 795.

(*i*) *Hammonds v. Barclay*, 1802, 2 East, 227; *Pulteney v. Keymer*, 1800, 3 Esp. 182.

(*k*) *Drinkwater v. Goodwin*, 1775, Cowp. 251.

were consigned to the agent, and he accepted a bill for their value. Before the bill became due the company was wound up, and the liquidators took possession of and sold the goods. Held, that the agent, having paid the bill, had a lien upon the goods for the amount, and was entitled to be repaid out of the proceeds thereof in preference to the other creditors of the company (*l*).

7. *Solicitor's general lien*.—Every solicitor has a lien, for his general bill of costs, upon all documents and chattels belonging to his client of which he lawfully obtains possession in his capacity of solicitor, and the Court will not interfere with his general lien by ordering him to deliver up papers deposited with him for the purposes of a particular suit, upon payment of the costs in that suit, even if the possession of the papers is necessary to enable the client to go on with the proceedings (*m*).

8. *Goods or chattels must be in agent's possession*.—A. bought goods as a factor for and on behalf of B., and it was agreed that the goods should remain upon the premises of the seller at a rent to be paid by B. After a time A. was requested by the seller to remove the goods, but did not do so. Subsequently, without B.'s authority or instructions, A. removed the goods to his own premises, and at about the same time a petition in bankruptcy was presented against B. Held, that the possession of the goods continued in B., and that A. had therefore no lien upon them (*n*). So, where a factor accepted bills upon the faith of a consignment of goods, and both he and the principal became bankrupt before the arrival of the cargo, it was held that the

(*l*) *In re Pavy's Felted Fabric Co.*, 1876, 1 Ch. Div. 631; 45 L. J. Ch. 318.

(*m*) *Re Broomhead*, 1847, 5 D. & L. 52; 16 L. J. Q. B. 355; 79 E. R. 839; *Worrall v. Johnson*, 1820, 2 J. & W. 214; 22 R. R. 106; *Friswell v. King*, 1846, 15 Sim. 191; 74 R. R. 57; *Stevenson v. Blake-lock*, 1813, 1 M. & S. 535; 14 R. R. 525.

(*n*) *Taylor v. Robinson*, 1818, 2 Moo. 730.

factor's trustee in bankruptcy had no lien upon the cargo, and therefore no claim against the principal's trustee, who had sold the cargo and received the price, because the goods had never been in the factor's possession (*o*). Constructive possession of goods by the agent is, however, sufficient for the purpose of establishing his lien thereon (*p*). And an agreement, made for valuable consideration, to hand over a bill of lading to an agent, for the purpose of giving him a security on the goods represented thereby, gives the agent a right, in equity, to the bill of lading and possession of the goods, as against the principal and his creditors (*q*).

9. *Goods in the order and disposition of the principal.*—A. was appointed by a Glasgow firm to manage a warehouse in London, and it was expressly agreed that he should have a lien upon the goods stored in the warehouse. The business was carried on, and the goods were stored, in the name of the firm, who became bankrupt. Held, that the goods were in the order and disposition of the firm, and that in consequence of the "order and disposition" clause of the Bankruptcy Acts, A.'s lien was not effective, though he had physical custody and control of the goods (*r*).

10. *Debt or obligation must be incurred in course of the agency.*—A., a factor, sold goods in his own name on B.'s behalf to C. C. subsequently sent goods to A. for sale, never having employed him as a factor before. C. became bankrupt. Held, that A. had no lien upon C.'s goods for the price of the goods sold by him on B.'s behalf. The lien of an agent is confined to what is due to him as such agent, and does not extend to a debt incurred before the commence-

(*o*) *Kinloch v. Craig*, 1790, 3 T. R. 119, 783; 1 R. R. 664, H. L.

(*p*) *Bryans v. Nix*, 1839, 4 M. & W. 775; 8 L. J. Ex. 137; 51 R. R. 819.

(*q*) *Ex p. Barber*, 1843, 3 M. D. & De G. 174; *Lutscher v. Comptoir d'Escompte*, 1876, 1 Q. B. D. 709.

(*r*) *Hoggard v. Mackenzie*, 1858, 25 Beav. 493; 119 R. R. 505. See Bankruptcy Act, 1883, s. 44.

ment of the agency (s). So, the general lien of a solicitor is confined to taxable costs, charges, and expenses, and does not extend to ordinary advances, or any other claims made otherwise than in the capacity of a solicitor (t). Nor does the lien of a solicitor upon deeds handed to and retained by him personally extend to the general bill of costs of his firm (u).

11. *The goods or chattels must be obtained lawfully.*—A lien cannot be acquired by a wrongful act. Thus, if an agent obtains goods from his principal by misrepresentations, he has no lien thereon, though the circumstances in other respects be such that he would have had a lien if the goods had been obtained lawfully (x). So, where an agent of the managing owner of a ship made the freight payable to himself without authority to do so, it was held that he had no lien on the freight received by him for a debt due from the principal (y). So, a solicitor's general lien does not attach on documents or chattels obtained by him without the authority of the client (z).

12. *The goods or chattels must be acquired in the same capacity as that in which the lien is claimed.*—A factor insures a ship on his principal's behalf, the transaction being quite distinct and separate from his duties as factor. His general lien does not extend to the policy of insurance, because he did not acquire it in the capacity of factor (a).

(s) *Houghton v. Matthews*, 1803, 3 B. & P. 485; 7 R. R. 815.

(t) *Re T aylor, Ex p. Payne Collier*, (1891) 1 Ch. 590; 60 L. J. Ch. 525; *Re Galland*, 1885, 31 Ch. D. 296, C. A.; *Re Walker*, 1893, 68 L. T. 517; *Re Hanbury*, 1897, 75 L. T. 449.

(u) *Re Gough*, 1894, 70 L. T. 725. See also *Re Forshaw*, 1847, 17 L. J. Ch. 61; 16 Sim. 121; 80 R. R. 43.

(x) *Madden v. Kempster*, 1807, 1 Camp. 12.

(y) *Walsh v. Provan*, 1853, 8 Ex. 843; 22 L. J. Ex. 355; 91 R. R. 795.

(z) *Gibson v. May*, 1853, 4 De G. M. & G. 512; 102 R. R. 246; *Wickens v. Townshend*, 1830, 1 Russ. & M. 361; 32 R. R. 221; *Leete v. Leete*, 1879, 48 L. J. P. 61; *Cross v. Cross*, 1881, 43 L. T. 533.

(a) *Dixon v. Stansfeld*, 1850, 10 C. B. 398; 84 R. R. 631.

So, if a policy is left merely for safe custody in an agent's hands, he has no general lien thereon for advances (*b*). So, the general lien of a solicitor does not attach on an original will left in his hands by his client (*c*), nor on documents coming into his possession as mortgagee of the client's estate (*d*), or as town clerk (*e*), or steward (*f*), or deposited with him merely for safe custody (*g*). So, a banker's lien for the general balance due to him is confined to property deposited with him in the capacity of a banker, and does not extend, *e.g.*, to boxes of securities left with him merely for safe custody (*h*). But it extends to all bills, cheques, and money paid into the bank, and to all documents and securities deposited with him as a banker (*h*).

13. *Must be no agreement inconsistent with the lien.*—A life policy was deposited at a bank, with a memorandum charging it with overdrafts not exceeding a specified amount. Held, that the banker's general lien was excluded by the special contract, such contract being inconsistent with the existence of a general lien on the policy (*i*). So, where a partner deposited a lease with a banker to secure a particular advance to his firm, it was held that the banker had no lien thereon for the general balance due from the firm (*k*). So,

(*b*) *Muir v. Fleming*, 1823, D. & R. N. P. C. 29; 25 R. R. 775.

(*c*) *Bulch v. Symes*, 1823, 1 T. & R. 87; 23 R. R. 195; *Georges v. Georges*, 1811, 18 Ves. 294.

(*d*) *Pelly v. Wathen*, 1849, 7 Hare, 351; *Sheffield v. Eden*, 1878, 10 Ch. D. 291, C. A.

(*e*) *Rex v. Sankey*, 1836, 5 A. & E. 423; 44 R. R. 453.

(*f*) *Champernown v. Scott*, 1821, 6 Madd. 93; 22 R. R. 248.

(*g*) *Ex p. Fuller, Re Long*, 1881, 16 Ch. D. 617; 50 L. J. Ch. 448.

(*h*) *Misa v. Currie*, 1876, 1 App. Cas. 554; 45 L. J. Ex. 852, H. L.; *London Charterd Bank v. White*, 1879, 4 App. Cas. 413; 48 L. J. P. C. 75, P. C.; *Scott v. Franklin*, 1812, 15 East, 428.

(*i*) *In re Bowes, Strathmore v. Vane*, 1886, 33 Ch. D. 586; 56 L. J. Ch. 143. See also *Ex p. McKenna*, 1861, 30 L. J. Bk. 20; 3 De G. F. & J. 629; *Vanderzee v. Willis*, 1789, 3 Bro. C. C. 21.

(*k*) *Wolstenholm v. Sheffield Bank*, 1886, 54 L. T. 746.



if a factor expressly agrees to deal in a particular way with the proceeds of goods deposited with him for sale, his general lien is thereby excluded (*l*). But the lien is not excluded unless the express contract is clearly inconsistent with its existence (*m*). Thus, where certain securities were deposited with stockbrokers for a specific loan, and they were given a power of sale, it was held that their general lien extended to such securities (*n*). So, an agreement that there shall be monthly settlements does not affect the lien of an insurance broker for premiums upon policies in his hands (*o*). So, the general lien of a factor is not excluded merely because he acts under special instructions to sell in his principal's name and at a particular price (*p*).

14. A. consigns goods to B., who transfers the bill of lading to his factor C., to secure 1,000*l*. B. becomes bankrupt. C. has no lien on the bill of lading for a general balance due from B., and A. may stop the goods *in transitu*, subject to C.'s claim for 1,000*l*. (*q*).

*No lien on goods or chattels intrusted to him for special purpose inconsistent therewith.*

15. Certain exchequer bills were deposited at a bank, to be kept in a box under lock and key, the key being kept by the customer. The bills were subsequently intrusted to the banker, with instructions to obtain the interest on them, and

(*l*) *Walker v. Birch*, 1795, 6 T. R. 258.

(*m*) *Brandao v. Barnett*, 1846, 12 C. & F. 787; 69 R. R. 204, H. L.; *Re European Bank, Agra Bank's claim*, 1872, L. R. 8 Ch. 41; *Davis v. Bowsher*, 1794, 5 T. R. 488; 2 R. R. 650.

(*n*) *Jones v. Peppercorne*, 1858, Johns. 430; 28 L. J. Ch. 158. See also *Re London & Globe Finance Corp.*, (1902) 2 Ch. 416; 71 L. J. Ch. 893.

(*o*) *Fisher v. Smith*, 1878, 4 App. Cas. 1; 48 L. J. Ex. 411, H. L.

(*p*) *Stevens v. Biller*, 1883, 25 Ch. Div. 31; 53 L. J. Ch. 249, C. A.; *König v. Brandt*, 1901, 84 L. T. 748, C. A.

(*q*) *Spalding v. Ruding*, 1843, 12 L. J. Ch. 503; 6 Beav. 376; 63 R. R. 120.

get them exchanged for new bills, and to deposit the new bills in the box as before. Held, that the banker's lien did not attach either on the original bills or on those for which they were exchanged, the special purpose for which they were placed in his hands being inconsistent with a right of general lien (*r*).

16. A. consigns goods to B. for sale, and in sending B. the bill of lading tells him that those goods will cover a bill of exchange which he has drawn in favour of C., and asks him to duly honour such bill. C. presents the bill to B., who refuses to accept it. The cargo duly arrives, and A. becomes bankrupt. B. cannot claim a general lien on the cargo, unless he pays the bill of exchange (*s*). Where an agent accepts goods with express directions to apply them or their proceeds in a particular way, he cannot set up his general lien in opposition to those directions (*s*). So, if A. sends bills to B. with instructions to discount them, and apply the proceeds for a particular purpose, and B. does not discount them, but receives the amount thereof after A. has become bankrupt, A.'s trustee in bankruptcy is entitled at his option to recover the value of the bills in trover, or to recover the proceeds as money had and received to his use, and B. has no right to set off a debt due to him from A. (*t*).

17. A factor, who acted as such for the owners of a ship, asked the master to let him have the certificate of registry for the purpose of paying certain duties at the custom house. Held, that his general lien as factor did not attach on the certificate (*u*).

(*r*) *Brandao v. Barnett*, 1846, 12 C. & F. 787; 69 R. R. 204, H. L.

(*s*) *Frith v. Forbes*, 1862, 32 L. J. Ch. 10; 4 De G. F. & J. 409; *Colvin v. Hartwell*, 1837, 5 Cl. & F. 484, H. L. *Comp. König v. Brandt*, 1901, 84 L. T. 748, C. A.

(*t*) *Buchanan v. Findlay*, 1829, 9 B. & C. 738; *Seligmann v. Huth*, 1877, 37 L. T. 488, C. A.; *Hill v. Smith*, 1844, 12 M. & W. 618; 13 L. J. Ex. 243; 67 R. R. 436; *Ex p. Gomez, Re Yglesias*, 1875, L. R. 10 Ch. 639.

(*u*) *Burn v. Brown*, 1817, 2 Stark. 272; 19 R. R. 719.

18. A deed, dealing with two distinct properties, was deposited at a bank, with a memorandum pledging one of the properties to secure a specific sum and also the general balance due to the banker. Held, that the banker had no lien upon the other property, the deed having been deposited with a specific intention inconsistent therewith (*x*). So, a banker has no lien upon muniments of title casually left at the bank after a refusal by him to advance money upon their security (*y*).

19. A solicitor received a sum of money from a client to pay off a certain mortgage, and then claimed to have a lien thereon for costs. He was summarily ordered to repay the amount to the client, on the ground that he had received it for a specific purpose inconsistent with such a lien (*z*). A solicitor's general lien for costs, however, attaches on papers deposited with him for a particular purpose, unless it is excluded by express agreement, or is clearly inconsistent with such purpose (*a*). It also attaches upon deeds of which he is permitted to retain possession after the special purpose for which they were left with him has failed (*b*).

(*x*) *Wylde v. Radford*, 1864, 33 L. J. Ch. 51.

(*y*) *Lucas v. Dorrien*, 1817, 7 Taunt. 278; 18 R. R. 480.

(*z*) *Re Cullen*, 1859, 27 Beav. 51; *Re Clark, Ex p. Newland*, 1876, 4 Ch. D. 515. If the particular purpose for which money is deposited with an agent fails, or a balance remains after such purpose is fulfilled, he must return the money or balance to the principal, and is not entitled to set off a debt due to him from the principal. *Stumore v. Campbell*, (1892) 1 Q. B. 314; 61 L. J. Q. B. 463, C. A.; *Re Mid-Kent Fruit Factory*, (1896) 1 Ch. 567; 65 L. J. Ch. 250.

(*a*) *Colmer v. Edr*, 1870, 40 L. J. Ch. 185.

(*b*) *Ex p. Pemberton*, 1810, 18 Ves. 282.

## Article 73.

CONFINED TO RIGHTS OF PRINCIPAL, EXCEPT IN THE  
CASE OF MONEY OR NEGOTIABLE SECURITIES.

The possessory lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against third persons, the right or power to create the lien, and except in the case of money or negotiable securities, and subject to any statutory provision to the contrary (*c*), is confined to the rights of the principal in the goods or chattels at the time when the lien attaches, and is subject to all rights and equities of third persons available against the principal at that time (*d*). The lien of an agent upon money or negotiable securities deposited with him by or in the name of the principal is not affected by the rights or equities of third persons, and is as effectual as if the principal were the absolute owner of such money or securities, provided that at the time when the lien of the agent attaches he has no notice of any defect in the title of the principal thereto (*e*).

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(*c*) *E.g.*, The Factors Act, 1889 (see Appendix); Sale of Goods Act, 1893, s. 25.

(*d*) See Illustrations. And see *Att.-Gen. v. Trueman*, 1843, 13 L. J. Ex. 70; 11 M. & W. 694; *Att.-Gen. v. Walmsley*, 1843, 13 L. J. Ex. 66; 12 M. & W. 179; *Re Harrauld, Wilde v. Walford*, 1884, 53 L. J. Ch. 505, C. A.; *Manningford v. Toleman*, 1845, 1 Coll. 670; 66 B. R. 239; *Re Union Cement Co.*, 1872, 26 L. T. 240; *Peat v. Clayton*, (1906) 1 Ch. 659; 75 L. J. Ch. 344.

(*e*) Illustration 9. *Tindall v. Barnett*, 1887, 3 T. L. R. 476.

*Illustrations.*

1. No solicitor or other agent can have a lien on the share register or minute book of a joint stock company, because the directors have no power to create any lien that could interfere with the use of such register or book for the purposes of the company (*f*). So, no lien can attach upon such books of a company as, under the articles of association or the Companies Acts, ought to be kept at the registered office of the company (*g*). So, where documents come into the hands of a solicitor pending the winding-up of a company, he cannot claim any lien thereon that would interfere with the winding-up (*f*). But the circumstance that a company has issued debentures as a floating security does not prevent an agent from acquiring a lien on the title deeds of the company, and such a lien has priority to the claims of the debenture holders (*h*).

2. The directors of a building society, which has no borrowing powers, overdraw the banking account of the society, and agree that certain deeds deposited at the bank shall be held as security for the general balance. The transaction is *ultra vires*, and the banker has no lien on the deeds for the overdraft (*i*).

3. A solicitor or other agent is employed by trustees. He has no lien on the trust funds for his expenses (*k*). So, a

(*f*) *Re Capital Ins. Ass., Ex p. Beall*, 1883, 24 Ch. D. 408; 53 L. J. Ch. 71, C. A.; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96; 78 L. J. Ch. 132.

(*g*) *Re Anglo-Maltese Dock Co.*, 1885, 54 L. J. Ch. 730.

(*h*) *Brunton v. Electric Engineering Corporation*, (1892) 1 Ch. 434; 61 L. J. Ch. 256. See *Re Dee Estates*, (1911) 2 Ch. 85; 80 L. J. Ch. 461, C. A.

(*i*) *Cunliffe (or Brooks) v. Blackburn Building Society*, 1884, 9 A. C. 857; 54 L. J. Ch. 376, H. L. He is, however, in equity, entitled to hold them as security for so much of the money advanced as he can show to have been actually applied in payment of the debts and liabilities of the society. *Ibid.*

(*k*) *Staniur v. Evans*, 1887, 3 T. L. R. 215; *Worrall v. Harford*, 1802,

solicitor employed by a trustee in bankruptcy has no lien for costs on property of the bankrupt recovered by him as such solicitor (*l*).

4. Deeds are deposited with a solicitor by a tenant for life. The solicitor has no lien on the deeds as against the remainderman (*m*). The lien of a solicitor upon deeds and papers deposited with him by a client is confined to the rights of the client therein, and is subject to all rights and equities of third persons available against the client (*n*). So, a solicitor or other agent has no lien, as such, on the separate property of a partner for the obligations of the firm (*o*).

5. A mortgage is paid off, and the property is reconveyed to the mortgagor. The mortgagee's solicitor has no lien as against the mortgagor on the title deeds for costs due from the mortgagee, except the cost of the reconveyance, even if such costs were incurred in respect of the mortgaged property, *e.g.*, the costs of an attempted sale by the mortgagee (*p*). So, where a mortgagor borrowed the title deeds from the mortgagee and sold the property, it was held that the solicitor of the mortgagor, to whom the deeds were handed for the purpose of completing the sale, had no lien thereon

8 Ves. 4; *Lightfoot v. Keane*, 1836, 3 L. J. Ex. 257; 1 M. & W. 745; 46 R. R. 476; *Hall v. Laver*, 1842, 1 Hare, 571; 58 R. R. 198; *Francis v. Francis*, 1854, 5 De G. M. & G. 108; 104 R. R. 47.

(*l*) *Re Humphreys, Ex p. Lloyd-George*, (1898) 1 Q. B. 520; 67 L. J. Q. B. 412, C. A. See also *Meguerditchian v. Lightbound*, (1917) 2 K. B. 298; 86 L. J. K. B. 889, C. A.

(*m*) *Turner v. Letts*, 1855, 24 L. J. Ch. 638; 20 Beav. 185; 109 R. R. 97; *Ex p. Nesbitt*, 1805, 2 Sch. & Lef. 279.

(*n*) *Hollis v. Claridge*, 1813, 4 Taunt. 807; 39 R. R. 662; *Pratt v. Vizard*, 1833, 5 B. & Ad. 808; 39 R. R. 660; *Pelly v. Wathen*, 1851, 1 De G. M. & G. 16; *Oxenham v. Esdaile*, 1828, 2 Y. & J. 493; *Furlong v. Howard*, 1804, 2 Sch. & Lef. 115; 53 R. R. 79.

(*o*) *Turner v. Deane*, 1849, 18 L. J. Ex. 343; 3 Ex. 836; 77 R. R. 855; *Watts v. Christie*, 1849, 18 L. J. Ch. 173; 11 Beav. 546; 83 R. R. 259.

(*p*) *Re Llewellyn*, (1891) 3 Ch. 145; 60 L. J. Ch. 732; *Wakefield v. Newbon*, 1844, 6 Q. B. 276; 13 L. J. Q. B. 258; 66 R. R. 379.

for costs due from the mortgagor in respect of other transactions (*q*).

6. A. sells goods to B., and ships them to his order. Before the goods arrive, A. and B. agree to rescind the contract for sale. The wharfinger cannot, on the arrival of the goods at his wharf, claim a lien on them as against A., for a general balance due from B. (*r*). So, a wharfinger has no lien on goods, as against a buyer, for charges becoming due from the seller after the wharfinger has had notice of the sale (*s*).

7. A., an owner of land, deposits the title deeds at a bank as security for his general balance, and subsequently contracts to sell the land to B., who has notice of the terms of the deposit. The banker has notice of the sale, but continues the account, and makes fresh advances to A., who pays in sums from time to time. B. pays the purchase-money to A. by instalments, without notice of such advances. A. having paid into the bank sums exceeding in the aggregate the amount owing to the bank at the time of the contract of sale, the banker has no lien on the title deeds or charge on the land as against B., though on the general balance there was always a debt due to the bank (*t*).

8. Goods are consigned to a factor for sale, the principal having committed an act of bankruptcy. The factor, with notice of the act of bankruptcy, advances money to the principal. The factor has no lien on the goods for the advances, and having sold them and received the proceeds, must account for such proceeds to the trustee in bankruptcy, because the principal had no power after the act of bankruptcy to create any lien (*u*).

(*q*) *Young v. English*, 1843, 7 Beav. 10; 64 R. R. 5.

(*r*) *Richardson v. Goss*, 1802, 3 B. & P. 119; 6 R. R. 727.

(*s*) *Barry v. Longmore*, 1840, 12 A. & E. 639; 54 R. R. 654.

(*t*) *London and County Bank v. Ratchliffe*, 1881, 6 A. C. 722; 51 L. J. Ch. 28, H. L.

(*u*) *Copland v. Stein*, 1799, 8 T. R. 199. Otherwise, if the factor had

9. *Negotiable instruments*.—A banker borrowed a specific sum of money from a stockbroker, with whom he deposited, as security, negotiable instruments belonging to third persons. The banker dealt as a principal with the broker, having had many previous transactions with him, and there was nothing to lead the broker to believe that the securities were not the property of the banker. Held, that the broker's general lien for the balance due to him from the banker attached upon the securities, although the banker had been guilty of gross fraud (*x*). So, the general lien of a banker upon negotiable instruments deposited with him is not affected by the circumstance that the customer who deposits them is acting as agent for a third person (*y*), nor by equities between the customer and third persons (*z*). But an agent has no lien upon a negotiable instrument, as against the true owner, for advances made after notice of a defect in the title of the principal (*a*). So, a banker has no lien on a fund in his hands, in respect of any claims arising after notice of an assignment of the fund to a third person (*b*), or after notice that the fund belongs to a third person (*c*).

made the advances without notice of the act of bankruptcy, and before the date of the receiving order. See 4 & 5 Geo. 5, c. 59, s. 45.

(*x*) *Jones v. Peppercorne*, 1858, Johns. 430; 28 L. J. Ch. 158.

(*y*) *Brandao v. Barnett*, 1846, 12 C. & F. 787; 69 R. R. 204, H. L.; *Baker v. Nottingham Bank*, 1891, 60 L. J. Q. B. 542; *Bank of New South Wales v. Goulburn Valley Butter Factory*, (1902) A. C. 543; 71 L. J. P. C. 112, P. C.

(*z*) *Misa v. Currie*, 1876, 1 A. C. 554; 45 L. J. Ex. 852, H. L.; *Johnson v. Roberts*, 1875, L. R. 10 Ch. 505; 44 L. J. Ch. 678.

(*a*) *Solomons v. Bank of England*, 1810, 13 East, 135; 12 R. R. 341; *De la Chaumette v. Bank of England*, 1829, 9 B. & C. 208; 32 R. R. 643. And see *Redfern v. Rosenthal*, 1902, 86 L. T. 855, C. A.

(*b*) *Jeffreys v. Agra Bank*, 1866, L. R. 2 Eq. 674; 35 L. J. Ch. 686.

(*c*) *Locke v. Prescott*, 1863, 32 Beav. 261; *Ex p. Kingston, Re Gross*, 1871, L. R. 6 Ch. 632; 40 L. J. Bk. 91; *Cuthbert v. Roberts*, (1909) 2 Ch. 226; 78 L. J. Ch. 529, C. A.



## Article 74.

## LIEN OF SUB-AGENTS.

Except where otherwise expressly provided by statute (*d*), a sub-agent who is employed without the authority, express or implied, of the principal, has no lien on the goods or chattels of the principal, as against the principal (*e*).

Where a sub-agent is appointed by an agent with the authority, express or implied, of the principal, the sub-agent—

- (a) has the same right of lien, general or particular, against the principal, on the goods and chattels of the principal, in respect of claims arising in the course of the sub-agency, as he would have had against the agent if the agent had been the owner of the goods and chattels; and such right of lien is not liable to be defeated by any settlement between the principal and agent to which the sub-agent is not a party (*f*);
- (b) has the same right of general lien on the goods and chattels of the principal in respect of all claims, whether arising in

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(*d*) See Factors Act, 1889 (Appendix); Sale of Goods Act, 1893, s. 25.

(*e*) Illustration 1.

(*f*) Illustrations 5 and 6. *Blackburn v. Kymer*, 1814, 5 Taunt. 584; *Cahill v. Dawson*, 1857, 26 L. J. C. P. 253; 3 C. B. N. S. 106; 111 R. R. 565; *Mildred v. Maspons*, 1883, 8 A. C. 874; 53 L. J. Q. B. 33, H. L.

the course of the sub-agency or not, as he would have had against the agent if the agent had been the owner of the goods and chattels ; provided that, as against the principal, such right of lien is available only to the extent of the lien, if any, to which the agent would have been entitled if the goods and chattels had been in his possession (*f*); and

- (c) has the same right of lien, general or particular, on the goods and chattels of the principal, as he would have had against the agent if the agent had been the owner of the goods and chattels, provided that at the time when the lien attaches he believes on reasonable grounds that the agent is the owner of the goods and chattels and is acting in the matter on his own behalf (*g*).

#### *Illustrations.*

1. A factor delegates his authority to a sub-agent, without the assent of the principal. The sub-agent has no lien on the principal's goods, even for duties paid in respect of those goods (*h*).

2. An agent, on behalf and with the authority of his principal, employs an insurance broker to effect a policy, the broker having no notice, and being unaware, that he is dealing with an agent. The broker has a lien on the policy for

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(*f*) See note (*f*), p. 249, *ante*.

(*g*) Illustrations 2 to 4.

(*h*) *Solly v. Rathbone*, 1814, 2 M. & S. 298.

the general balance due to him from the agent, and is entitled to apply the proceeds of the policy in payment of such balance, notwithstanding that he has, in the meantime, received notice of the principal's rights (*i*).

3. A., a commission agent, employed B., a broker, to buy certain goods, B. having no knowledge that A. was acting as an agent. B. bought and paid for the goods and retained the warrants therefor. A. was in fact acting for C., and C. paid A. for the goods. B., on A.'s instructions, resold the goods, and applied the proceeds in reduction of a running account between himself and A. In an action by C. against B. for converting the goods, it was held that B. was not liable, because at the time of the sale he had a lien on the goods for the balance due to him from A. (*k*).

4. A. employed B. to collect general average contributions under an insurance policy. B., in the ordinary course of business, employed C., an insurance broker, to collect the contributions, C. being unaware that B. was acting as an agent. C. collected the contributions, and B. became bankrupt. Held, in an action by A. against C. for the contributions, as money had and received to his use, that C. was entitled to set off the amount of a debt due to him from B. (*l*).

5. An agent, on behalf of his principal, employs an insurance broker to effect a policy, the broker being aware that the agent is acting for a principal. The principal pays the agent the amount of the premiums due in respect of the policy. Notwithstanding such payment, the broker has a lien upon the policy for premiums in respect thereof paid by

(*i*) *Mann v. Forrester*, 1814, 4 Camp. 60; 15 R. R. 724; *Maanss v. Henderson*, 1801, 1 East, 335; *Westwood v. Bell*, 1815, 4 Camp. 349; 16 R. R. 800.

(*k*) *Taylor v. Kymer*, 1832, 3 B. & Ad. 320; 37 R. R. 433.

(*l*) *Montagu v. Forwood*, (1893) 2 Q. B. 350, C. A. And see *New Zealand, &c. Land Co. v. Watson*, 1881, 7 Q. B. D. 374; 50 L. J. Q. B. 433, C. A.

him, or for which he is liable (*m*). But he has no lien, as against the principal, for a general balance due from the agent in respect of other transactions (*n*).

6. As against the solicitor employing him, a London agent has a general lien upon all moneys recovered and documents deposited with him in the course of his employment (*o*), but as against the client, his general lien is limited to the amount due from the client to the country solicitor (*p*). As against both the country solicitor and the client, he has a lien upon money recovered and documents deposited with him in a particular suit, for the amount of his agency charges and disbursements in connection with that suit (*q*).

*Solicitor's charging Lien on property recovered or preserved through his instrumentality.*

Whenever a solicitor is employed to prosecute or defend any suit or proceeding in a Court of justice, the Court or judge before whom the suit or proceeding has been heard, or is depending, may declare such solicitor entitled to a charge upon the property recovered or preserved (*r*), and upon such

(*m*) *Fisher v. Smith*, 1878, 4 App. Cas. 1; 48 L. J. Ex. 411, H. L.

(*n*) *Mildred v. Maspons*, 1883, 8 A. C. 874; 53 L. J. Q. B. 33, H. L.; *Levy v. Barnard*, 1818, 2 Moo. 34; 19 R. R. 484; *Man v. Schiffner*, 1802, 2 East, 523; *Snook v. Davidson*, 1809, 2 Camp. 218; 11 R. R. 696; *Maanss v. Henderson*, 1801, 1 East, 335; *Ladbroke v. Lee*, 1850, 4 De G. & S. 106; 87 R. R. 306. See also *Fairfield Shipbuilding Co. v. Gardner*, 1911, 104 L. T. 288.

(*o*) *Lawrence v. Fletcher*, 1874, 12 Ch. Div. 858; *Bray v. Hine*, 1818, 6 Price, 203; 20 R. R. 623; *Re Jones and Roberts*, (1905) 2 Ch. 219; 74 L. J. Ch. 458, C. A.

(*p*) *Ex p. Edwards, Re Johnson*, 1881, 8 Q. B. D. 262; 51 L. J. Q. B. 108, C. A.; *Moody v. Spencer*, 1822, 2 D. & R. 6; *Waller v. Holmes*, 1860, 1 Johns. & H. 239; 30 L. J. Ch. 24.

(*q*) *Dicas v. Stockley*, 1836, 7 C. & P. 587; 48 R. R. 825; *Lawrence v. Fletcher, supra*.

(*r*) As to the meaning of "property recovered or preserved," see *Rowlands v. Williams*, 1885, 2 T. L. R. 72, C. A.; *Scholefield v. Lock-*

declaration being made, such solicitor has a charge upon and right to payment out of the property, of whatsoever nature it may be, which has been recovered or preserved through his instrumentality, for the taxed costs and expenses of or in reference to such suit or proceeding; and all conveyances made and acts done to defeat, or which operate to defeat, such charge or right, unless made to a *bonâ fide* purchaser for value without notice (*s*), are absolutely void as against such charge or right; provided that no such declaration may be made in any case where the right to recover payment of the costs or expenses is barred by any Statute of Limitations (*t*). The right to such a declaration is often referred to as a "charging lien." It will pass to the assignee or legal personal representative of the solicitor (*u*). The order is a matter of judicial discretion (*x*), and must be made in the Court to which the particular suit is attached (*y*). The

*Wood*, 1868, L. R. 7 Eq. 83; 38 L. J. Ch. 232; *Harrison v. Harrison*, 1888, 13 P. D. 180; 58 L. J. P. 28, C. A.; *Re Pinkerton*, *Pinkerton v. Easton*, 1873, L. R. 16 Eq. 490; 42 L. J. Ch. 878; *Foxon v. Gascoigne*, 1874, L. R. 9 Ch. 654; 43 L. J. Ch. 729; *M'Larnon v. Carrickfergus U. C.*, (1904) 2 Ir. R. 44; *Re Clayton*, 1905, 92 L. T. 223; *Re Turner*, *Wood v. Turner*, (1907) 2 Ch. 126, 539, C. A.

(*s*) See *The Birnam Wood*, (1907) P. 1; 76 L. J. P. 1, C. A.

(*t*) 23 & 24 Vict. c. 127, s. 28. As to the Statute of Limitations, see *Ex p. Turner*, 1861, 30 L. J. Ch. 29; *Baile v. Baile*, 1871, L. R. 13 Eq. 497; 41 L. J. Ch. 300; *Smith v. Betty*, (1903) 2 K. B. 317; 72 L. J. K. B. 853, C. A.

(*u*) *Briscoe v. Briscoe*, (1892) 3 Ch. 543; 61 L. J. Ch. 665; *Baile v. Baile*, *supra*, note (*t*).

(*x*) *Harrison v. Harrison*, 1888, 13 P. D. 180; 58 L. J. P. 28, C. A.; *Ex p. Harper*, *Re Pooley*, 1882, 20 Ch. D. 685; 51 L. J. Ch. 810; *Re Born*, *Curnock v. Born*, (1900) 2 Ch. 433; 69 L. J. Ch. 669; *In re Turner*, *Wood v. Turner*, (1907) 2 Ch. 126, 539; 76 L. J. Ch. 492, C. A.; *In re Cockrell's Estate*, (1912) 1 Ch. 23; 81 L. J. Ch. 152, C. A.

(*y*) *Heinrich v. Sutton*, *Re Fiddey*, 1871, L. R. 6 Ch. 865; *Catlow v. Catlow*, 1877, 2 C. P. D. 362; *Higgs v. Schrader*, 1878, 3 C. P. D. 252; 47 L. J. C. P. 426; *Owen v. Henshaw*, 1877, 7 Ch. D. 385; 47 L. J. Ch. 267; *Clover v. Adams*, 1881, 6 Q. B. D. 622; *Re Cook*, *Ex p. Cripps*

Act applies only to costs and expenses connected with proceedings in a Court of justice (*z*), not, *e.g.*, to the costs of an arbitration (*a*). All property recovered or preserved (*b*) in any such proceedings by the instrumentality of a solicitor is subject to his charging lien for the cost of such proceedings, even if the verdict and judgment therein are against his client (*c*). Thus, it attaches upon money received by way of compromise (*c*), or awarded to the client upon a reference of the suit to arbitration (*d*). So, where, in a suit by a *cestui que trust* against his trustee, the plaintiff, after the appointment of a receiver, compromised with the defendant without consulting his solicitor, it was held that the solicitor was entitled to a first charge on the plaintiff's interest in the trust property (*e*). So, where a defendant was ordered to pay money into Court to abide the event of an action, and after he had paid it in the parties collusively compromised the action, the plaintiff's solicitor was held entitled to a charging order on the amount so paid in (*f*). So, where an action was dismissed, with costs amounting to 298*l.*, which were duly paid, and upon an appeal by the plaintiff, the decision was reversed and the defendant ordered to repay the 298*l.*, together with the costs of the appeal, amounting to 165*l.*, it was held that the solicitors who acted for the plaintiff on the appeal were entitled, in addition to

(1899) 1 Q. B. 863; 68 L. J. Q. B. 597; *Re Deakin, Ex p. Daniell*, (1900) 2 Q. B. 489; 69 L. J. Q. B. 725, C. A.

(*z*) *Re Humphreys, Ex p. Lloyd-George*, (1898) 1 Q. B. 520; 67 L. J. Q. B. 412, C. A.

(*a*) *Macfarlane v. Lister*, 1888, 37 Ch. Div. 88; 57 L. J. Ch. 92, C. A.

(*b*) *Ante*, p. 252, note (*r*).

(*c*) *Davies v. Loundes*, 1847, 3 C. B. 823; 71 R. R. 497; *Ross v. Buxton*, 1889, 42 Ch. Div. 190; 58 L. J. Ch. 442; *M'Larnon v. Carrickfergus U. C.*, (1904) 2 Ir. R. 44.

(*d*) *Ormerod v. Tate*, 1801, 1 East, 464; 6 R. R. 327.

(*e*) *Twynam v. Porter*, 1870, L. R. 11 Eq. 181; 40 L. J. Ch. 30. And see *Re Wright's Trusts*, (1901) 1 Ch. 317; 70 L. J. Ch. 119, C. A.

(*f*) *Mozon v. Sheppard*, 1890, 24 Q. B. D. 627; 59 L. J. Q. B. 286.

the 165*l.*, to a charge on the 298*l.*, for the extra costs of the appeal as between solicitor and client (*g*). Money paid into Court by a plaintiff, as security for the defendant's costs, is not, however, on a judgment for the plaintiff, deemed to be property preserved, within the meaning of the Act (*h*). The lien is confined to the costs of the proceedings for recovering or preserving the particular property, and does not extend to the costs of a separate action by the same client (*i*). The charge is in the nature of salvage, and may be made on the interests in the property recovered or preserved of all persons who benefit by the proceedings, though they were not parties thereto, and did not employ the solicitor (*k*).

*Priority of charging lien.*—A solicitor is entitled to a charging order, even if he was discharged before the trial, but subject to the lien for costs of the solicitor for the time being (*l*). Such a charge has priority to a garnishee order in reference to the fund recovered (*m*), and to the claims of all purchasers for value and others who acquire their interests

(*g*) *Guy v. Churchill*, 1887, 35 Ch. Div. 489; 56 L. J. Ch. 670, C. A.

(*h*) *Re Wadsworth, Rhodes v. Sugden*, 1885, 29 Ch. Div. 517; 54 L. J. Ch. 638; *Pierson v. Knutsford Estates Co.*, 1884, 13 Q. B. D. 666; 53 L. J. Q. B. 181, C. A.

(*i*) *Mackenzie v. Mackintosh*, 1891, 64 L. T. 706, C. A.; *Smith v. Betty*, (1903) 2 K. B. 317; 72 L. J. K. B. 853, C. A.

(*k*) *Greer v. Young*, 1882, 24 Ch. D. 545; 52 L. J. Ch. 915, C. A.; *Scholey v. Pck*, (1893) 1 Ch. 709; 62 L. J. Ch. 658; *Bulley v. Bulley*, 1878, 8 Ch. D. 479; 47 L. J. Ch. 841, C. A.; *Charlton v. Charlton*, 1883, 52 L. J. Ch. 971; *Emden v. Carte*, 1881, 19 Ch. D. 311; 51 L. J. Ch. 371; *Ex p. Tweed*, (1899) 2 Q. B. 167; 68 L. J. Q. B. 794, C. A.; *Re Horne, Horne v. Horne*, (1906) 1 Ch. 271; 75 L. J. Ch. 206. *Berrie v. Howitt*, 1869, L. R. 9 Eq. 1, must be considered overruled.

(*l*) *Re Wadsworth*, *supra*, note (*h*); *Re Knight, Knight v. Gardner*, (1892) 2 Ch. 368; 61 L. J. Ch. 399; *Pilcher v. Arden*, 1877, 7 Ch. D. 318; 47 L. J. Ch. 479, C. A.

(*m*) *Ex p. Adams, Dallow v. Garrold*, 1884, 14 Q. B. D. 543; 54 L. J. Q. B. 76, C. A.; *Shippey v. Gray*, 1880, 49 L. J. C. P. 524, C. A. And see *The Heinrich*, 1872, L. R. 3 Ad. 505; 41 L. J. Ad. 68.

with a knowledge of the proceedings (*n*), and is paramount to a restraint on anticipation attached to the property recovered or preserved of a married woman (*o*). Where a receiver was appointed in an action for dissolution of partnership, it was held that the charging lien of the plaintiff's solicitor had priority to the claims of the creditors of the partnership (*p*).

*Effect of compromise, &c.*—The charging lien of a solicitor will not be permitted by the Court to be prejudicially affected by a collusive compromise (*q*), or by an agreement between the parties (*r*). Thus, where two actions were pending between the same parties, and they agreed to refer both actions to arbitration, the result being that 100*l.* was awarded to one of the parties, and 80*l.* to the other, it was held that the 80*l.* could not be set off against the 100*l.* to the prejudice of a solicitor who claimed a lien for the costs of the action in respect of which the 100*l.* was awarded to his client (*r*). Nor will the costs of the opponent in a separate action be permitted to be set off to the prejudice of the solicitor's lien (*s*). So, on an application to set off cross judgments in distinct actions, the Court has discretion to order that the set-off shall be subject to the lien for costs of

(*n*) *Faithfull v. Ewen*, 1878, 7 Ch. D. 495; 47 L. J. Ch. 457, C. A.; *Cole v. Eley*, (1894) 2 Q. B. 350; 63 L. J. Q. B. 682, C. A.; *Haynes v. Cooper*, 1864, 33 L. J. Ch. 488; *The Paris*, (1896) P. 77; 65 L. J. P. 42; *Ridd v. Thorne*, (1902) 2 Ch. 344; 71 L. J. Ch. 624; *M'Larnon v. Carrickfergus U. C.*, (1904) 2 Ir. R. 44. Comp. *The Birnam Wood*, (1907) P. 1; 76 L. J. P. 1, C. A.

(*o*) *Re Keane*, 1871, L. R. 12 Eq. 115; 40 L. J. Ch. 617.

(*p*) *Jackson v. Smith, Ex p. Digby*, 1884, 53 L. J. Ch. 972; *Re Suffield and Watts*, 1888, 20 Q. B. D. 693, C. A.

(*q*) *Sullivan v. Pearson, Ex p. Morrison*, 1868, L. R. 4 Q. B. 153; 38 L. J. Q. B. 65; *Price v. Crouch*, 1891, 60 L. J. Q. B. 767; *Re Margetson and Jones*, (1897) 2 Ch. 314; 66 L. J. Ch. 619.

(*r*) *Cowell v. Betteley*, 1834, 10 Bing. 432.

(*s*) *Blakey v. Latham*, 1889, 41 Ch. D. 518; *Hassell v. Stanley*, (1896) 1 Ch. 607; 65 L. J. Ch. 494; *Bake v. French*, (1907) 1 Ch. 428; 76 L. J. Ch. 299. But see *Puddephatt v. Leith*, (1916) 2 Ch. 168; 85 L. J. Ch. 543.



the solicitor of the opposite party (*t*). If the defendant in an action pays money to the plaintiff, either by way of compromise, or in pursuance of an award, or otherwise, after receiving notice from the plaintiff's solicitor of his claim to a charging lien thereon, the defendant is personally liable to such solicitor for his taxed costs in the proceedings, to the extent that the amount so paid by him would have satisfied such costs (*u*). But the Court will not interfere with a compromise entered into in good faith, and not with the intention of depriving the solicitor of his costs (*x*). Where a verdict for 25*l.* was entered, and a rule *nisi* was obtained to set it aside, it was held that a settlement for 10*l.*, made to avoid the expenses of a new trial, the plaintiff being a pauper, was not impeachable by the plaintiff's solicitor on the ground of his lien (*y*). And the lien is subject to the equities between the parties, and only attaches on the general result of the cause. Thus, where there is a counter-claim, or costs are ordered to be paid by the plaintiff in the same cause, the lien attaches only on the balance actually recovered by the plaintiff, after setting off the amount recovered by the defendant on the counterclaim, or the costs so ordered to be paid by the plaintiff (*z*). So, if the defendant is entitled, as against the plaintiff, to be relieved from the verdict, the Court will not abstain from interfering

(*t*) *Edwards v. Hope*, 1885, 14 Q. B. D. 922; 54 L. J. Q. B. 379.

(*u*) *Ross v. Buxton*, 1889, 42 Ch. Div. 190; 58 L. J. Ch. 442; *Ormerod v. Tate*, 1801, 1 East, 464; 6 R. R. 327; *Reud v. Dupper*, 1795, 6 T. R. 361; 3 R. R. 200. And see *The Leader*, 1868, L. R. 2 Ad. 314.

(*x*) *The Hope*, 1883, 8 P. D. 144; 52 L. J. P. 63, C. A.; *Clark v. Smith*, 1844, 6 M. & G. 1051; *Jones v. Bonner*, 1848, 2 Ex. 230; 76 R. R. 586; *Reynolds v. Reynolds*, 1909, 26 T. L. R. 104, C. A.

(*y*) *Ante*, note (*q*).

(*z*) *Westacott v. Bevan*, (1891) 1 Q. B. 774; 60 L. J. Q. B. 536; *Robert v. Buée*, 1878, 8 Ch. D. 198; 47 L. J. Ch. 414; *Pringle v. Glog*, 1879, 10 Ch. D. 676; 48 L. J. Ch. 380; *Jenner v. Morris*, 1863, 11 W. B. 943.

and giving effect to the defendant's rights, merely because the plaintiff's solicitor has a lien on the subject-matter (*a*). So, where a defendant against whom a judgment for damages was obtained had an unsatisfied judgment against the plaintiff in a former action, a set-off of the damages was allowed, notwithstanding that the plaintiff's solicitor had *ex parte* obtained a charging order for his costs (*b*).

*Town agents*.—A London agent is not entitled, as against the client, to a charging order under the Act, because he is not the solicitor employed by the client (*c*); but the country solicitor may apply for such an order, and the Court will then direct the costs of the London agent to be paid out of the fund in question to the extent of the country solicitor's interest therein (*d*). The London agent in no case has any higher right as against the client than the country solicitor (*e*).

### *Shipmaster's lien.*

Every shipmaster has a maritime lien on the ship and freight for his wages (*f*), and for disbursements or liabilities properly made or incurred by him on account of the ship (*g*), and has a possessory lien on the cargo for freight and general

(*a*) *Symons (or Simons) v. Blake*, 1835, 4 L. J. Ex. 259; 2 C. M. & R. 416; 41 R. R. 750.

(*b*) *Goodfellow v. Gray*, (1899) 2 Q. B. 498; 68 L. J. Q. B. 1032, C. A.; *Ward v. Haddrill*, (1904) 1 K. B. 399; 73 L. J. K. B. 277.

(*c*) *Macfarlane v. Lister*, 1888, 37 Ch. D. 88; 57 L. J. Ch. 92, C. A.

(*d*) *Tardrew v. Howell*, 1861, 31 L. J. Ch. 57; 3 Giff. 381.

(*e*) *Peatfield v. Barlow*, 1869, L. R. 8 Eq. 61; 38 L. J. Ch. 310; *Cockayne v. Harrison*, 1873, L. R. 15 Eq. 298; 42 L. J. Ch. 660.

(*f*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 167 (1), re-enacting 17 & 18 Vict. c. 104, s. 191; *The Neptune*, 1824, 1 Hag. Ad. 227.

(*g*) 57 & 58 Vict. c. 60, s. 167 (2), re-enacting 52 & 53 Vict. c. 46, s. 1, which made *Hamilton v. Baker*, 1889, 14 A. C. 209, H. L.; *Wilkins v. Carmichael*, 1779, 1 Doug. 101; *Smith v. Plummer*, 1818 1 B. & A. 575; 19 R. R. 391, no longer law.

average contributions due from the owners thereof (*h*). The lien for disbursements and liabilities is confined to such disbursements and liabilities as are made or incurred by the master in the ordinary course of his duty as such (*i*).

Maritime liens do not depend upon possession, but remain attached to the ship, notwithstanding any changes in the ownership (*k*), and are effectual even against a purchaser for value without notice (*l*). Where the rights of third parties are affected, however, such a lien may be lost by negligence or delay (*l*). Maritime liens are enforced by an Admiralty action *in rem*, in which the Court arrests and takes possession of the ship, in order, by sale or otherwise, to realize the amount of the lien (*m*). They are payable in the inverse order of their attachment on the *res* (*n*). Thus, a bottomry bond has priority to a maritime lien for wages and disbursements earned and made in the previous voyage to that in which the bond was given; and *vice versâ* (*n*). The master's maritime lien for wages and disbursements, whenever earned and made, has priority, as a general rule, to the claim of a purchaser or mortgagee (*o*), and all other claims, except for

(*h*) *The Galam*, 1863, 33 L. J. Adm. 97, P. C.; *Kirchner v. Venus*, 1858, 12 Moo. P. C. 361, P. C. And see 57 & 58 Vict. c. 60, ss. 494 to 498.

(*i*) *The Castlegate*, (1893) A. C. 38; 62 L. J. P. C. 17, H. L.; *The Orienta*, (1895) P. 49; 64 L. J. P. 32, C. A.; *The Fairport*, 1882, 8 P. D. 48; 52 L. J. Ad. 21. Comp. *The Ripon City*, (1897) P. 226; 66 L. J. P. 110.

(*k*) *The Charles Amelia*, 1868, L. R. 2 Ad. 330; 38 L. J. Ad. 17.

(*l*) *Harmer v. Bell (The Bold Buccleugh)*, 1850, 7 Moo. P. C. 267; 83 R. R. 43, P. C.; *The Europa*, 1863, 32 L. J. Ad. 188; 2 Moo. P. C. N. S. 1.

(*m*) *The Cella*, 1888, 13 P. D. 82; 57 L. J. Ad. 55, C. A.

(*n*) *The Hope*, 1872, 28 L. T. 287; *The William Safford*, 1860, Lush. 69.

(*o*) *The Ringdove*, 1886, 11 P. Div. 120; 55 L. J. P. 56; *The Mary Ann*, 1865, L. R. 1 Ad. 8; *The Hope*, 1872, 28 L. T. 287.

salvage and collision (*p*). Where, however, the master binds himself personally by a bottomry bond, or personally guarantees the payment of a mortgage debt, he cannot claim priority for his lien to the prejudice of the bondholder or mortgagee (*q*). So, where a master, who was also a part owner, ordered necessaries, it was held that the claim for the necessaries had priority to that of the master for his wages and disbursements (*r*); but the priority of a master's lien to the claim of a mortgagee is not affected by the circumstance that the master is also a part owner, unless he is one of the mortgagors (*s*).

### Article 75.

#### HOW LIEN EXTINGUISHED OR LOST

The lien of an agent is extinguished or lost—

- (a) by his entering into any agreement (*t*), or acting in any capacity (*u*), which is inconsistent or incompatible with the continuance of the lien ;
- (b) by waiver, express or implied. A waiver is implied whenever the conduct of the agent is such as to indicate an intention to abandon the lien, or is inconsistent

(*p*) *The Panthea*, 1871, 25 L. T. 389; *The Elin*, 1883, 8 P. D. 129; 52 L. J. Ad. 55, C. A.

(*q*) *The Salacia*, 1863, 32 L. J. Ad. 41. Comp. *The Edward Oliver*, 1867, L. R. 1 Ad. 379; 36 L. J. Ad. 13; *The Daring*, 1868, L. R. 2 Ad. 260; 37 L. J. Ad. 29; *The Bangor Castle*, 1896, 74 L. T. 768.

(*r*) *The Jenny Lind*, 1872, L. R. 3 Ad. 529; 41 L. J. Ad. 63.

(*s*) *The Feronia*, 1868, L. R. 2 Ad. 65; 37 L. J. Ad. 60.

(*t*) Illustration 1. *Forth v. Simpson*, 1849, 13 Q. B. 680; 18 L. J. Q. B. 263; 78 R. R. 496; *How v. Kirchner*, 1856, 11 Moo. P. C. 21 111 R. R. 10, P. C.

(*u*) Illustrations 2 and 3.

with the continuance thereof (*x*). In particular, a waiver may be implied from his taking other security for the claim secured by the lien (*y*), if the nature of the security, or the circumstances under which it is taken, is or are inconsistent with the continuance of the lien (*z*), or is or are such as to indicate an intention to abandon it (*a*).

The possessory lien of an agent is extinguished by his voluntarily parting with the possession of the goods or chattels subject thereto (*b*), except where he is induced to do so by fraud (*c*), or the circumstances under which he parts with such possession are consistent with the continuance of the lien, and are such as to clearly show that he intends to retain the lien (*d*); but it is not affected by the circumstance that possession has been obtained from him unlawfully or without his consent (*e*).

The lien of an agent is not affected by the cir-

(*x*) Illustrations 4 and 5.

(*y*) *Cowell v. Simpson*, 1809, 16 Ves. 275; 10 R. R. 181.

(*z*) *Angus v. MacLachlan*, 1881, 23 Ch. Div. 330; 52 L. J. Ch. 587; *Tamvaco v. Simpson*, 1866, L. R. 1 C. P. 363; 35 L. J. C. P. 196, Ex. Ch.

(*a*) Illustration 6. *The Albion*, 1872, 27 L. T. 723; *Grant v. Mills*, 1813, 2 Ves. & B. 306; 13 R. R. 101.

(*b*) Illustration 7. *Kruger v. Wilcox*, 1754, Ambl. 252; *Bligh v. Davies*, 1860, 28 Beav. 211.

(*c*) *Wallace v. Woodgate*, 1824, R. & M. 193.

(*d*) Illustration 8.

(*e*) *Dicas v. Stockley*, 1836, 7 C. & P. 587; 48 R. R. 825; *Re Carter*, 1886, 55 L. J. Ch. 230.

cumstance that the claim secured thereby becomes barred by the Statute of Limitations (*f*), or that the principal becomes bankrupt or insolvent (*g*), or sells or otherwise deals with the goods or chattels subject to the lien (*h*), after the lien has attached.

### *Illustrations.*

1. A shipmaster elects to allow the balance of his wages to remain in the hands of the managing owners at interest. He thereby surrenders his lien for such wages (*i*).

2. A solicitor acts for both mortgagor and mortgagee in carrying out a mortgage. The solicitor thereby loses his lien on the title deeds of the mortgaged property for costs due from the mortgagor, even if the costs were incurred prior to the mortgage, and the deeds are not permitted to be taken out of the solicitor's possession (*k*).

3. A solicitor prepares a marriage settlement, on the instructions of the intended husband, and retains it in his possession after the marriage. He has no lien on the settlement as against the trustees, the costs of preparing it being payable by the husband (*l*).

4. An agent causes goods upon which he has a lien to be

(*f*) *Spears v. Hartley*, 1798, 3 Esp. 81; 6 R. R. 814; *Re Broomhead*, 1847, 5 D. & L. 52; 16 L. J. Q. B. 355; 79 R. R. 839; *Curwen v. Milburn*, 1889, 42 Ch. D. 424, C. A.

(*g*) Illustration 9. *Ogle v. Story*, 1833, 4 B. & Ad. 735; *General Share Co. v. Chapman*, 1877, 46 L. J. C. P. 79; *The Cella*, 1888, 13 P. D. 82; 57 L. J. Ad. 55, C. A.; *Ex p. Underwood*, 1845, 9 Jur. 632; *Ex p. Moule*, 1821, 5 Madd. 462; *Ex p. Markby*, 1864, 11 L. T. 250.

(*h*) Illustration 10.

(*i*) *The Rainbow*, 1885, 5 Asp. M. C. 479.

(*k*) *Re Nicholson, Ex p. Quinn*, 1883, 53 L. J. Ch. 302; *Re Mason*, 1878, 10 Ch. D. 729; 48 L. J. Ch. 193; *Re Snell*, 1877, 6 Ch. D. 105; *Re Messenger, Ex p. Calvert*, 1875, 3 Ch. D. 317, not followed.

(*l*) *Re Lawrance, Bowker v. Austin*, (1894) 1 Ch. 556; 63 L. J. Ch. 205.

taken in execution at his own suit. He thereby waives the lien, though the goods are sold to him under the execution, and are never removed from his premises (*m*).

5. Upon a demand being made against an agent by his principal for a chattel upon which the agent has a lien, the agent claims to retain the chattel on some other ground, without mentioning the lien. He thereby waives the lien (*n*).

6. A solicitor, having a lien for costs, takes a security for the costs, and does not tell the client that he intends to reserve the lien. He is deemed to waive the lien, it being the duty of a solicitor, if he intends to reserve his lien in such a case, to explain to the client that such is his intention (*o*).

7. An agent delivers goods, on which he has a lien, on board a ship, to be conveyed on account and at the risk of the principal. The agent thereby surrenders his lien on the goods, and he has no power to revive it by stopping the goods *in transitu* (*p*).

8. A., a solicitor, on the instructions of a mortgagor, prepares and engrosses a reconveyance, which he sends to the solicitor of the mortgagee with a request that he will hold it on A.'s account, he having a lien thereon. The mortgagee executes the reconveyance. A.'s lien is not, under the circumstances, prejudiced by his parting with the possession of the engrossment, nor by its being executed by the mortgagee

(*m*) *Jacobs v. Latour*, 1828, 5 Bing. 130.

(*n*) *Weeks v. Goode*, 1859, 6 C. B. N. S. 367; 120 R. R. 164; *Boardman v. Sill*, 1808, 1 Camp. 410, n.

(*o*) *Re Morris*, (1908) 1 K. B. 473; 77 L. J. K. B. 265, C. A.; *Re Taylor, Ex p. Payne Collier*, (1891) 1 Ch. 590; 60 L. J. Ch. 525; *Bissell v. Bradford Tram Co.*, 1893, 9 T. L. R. 337, C. A.; *Groom v. Cheesewright*, (1895) 1 Ch. 730; *Re Douglas*, (1898) 1 Ch. 199; 67 L. J. Ch. 85. *Comp. Stevenson v. Blakelock*, 1813, 1 M. & S. 535; 14 R. R. 525.

(*p*) *Sweet v. Pym*, 1800, 1 East, 4; 5 R. R. 497; *Hathesing v. Laing*, 1873, L. R. 17 Eq. 92; 43 L. J. Ch. 233.

as a deed (*q*). So, if an agent gives up a chattel in order that the principal may sell it and account for the proceeds to the agent, he does not thereby lose his lien on the chattel (*r*).

9. Goods were consigned to a factor for sale, and after he had sold them the principal committed an act of bankruptcy. The factor subsequently received the price of the goods. Held, that he had a lien on the goods for the amount of a debt due to him from the principal, and that he was entitled, as against the trustee in bankruptcy, to retain the proceeds in payment of the debt (*s*). So, an order for the winding-up of a company does not affect the lien of a solicitor upon documents of the company, if the lien was acquired before the presentation of the winding-up petition (*t*).

10. The principal assigns to a third person goods in the possession of a factor. The assignment does not affect the factor's general lien on the goods (*u*). So, the lien of an agent upon a policy of insurance is effectual against a subsequent assignee of the policy who gives notice of the assignment to the insurer, though the agent has given no notice of his lien to the insurer (*x*).

(*q*) *Watson v. Lyon*, 1855, 7 De G. M. & G. 288; 109 R. R. 122.

(*r*) *North Western Bank v. Poynter*, (1895) A. C. 56; 64 L. J. P. C. 27, H. L.

(*s*) *Robson v. Kemp*, 1802, 4 Esp. 233; 8 R. R. 831.

(*t*) *Re Capital Fire Ins. Ass., Ex p. Beall*, 1883, 24 Ch. D. 408; 53 L. J. Ch. 71, C. A.; *Re Rapid Road Transit Co.*, (1909) 1 Ch. 96; 78 L. J. Ch. 132.

(*u*) *Godin v. London Ass. Co.*, 1758, 1 W. Bl. 103.

(*x*) *West of England Bank v. Batchelor*, 1882, 51 L. J. Ch. 199.



Sect. 4.—*Other miscellaneous rights.*

## Article 76.

## RIGHTS IN RESPECT OF GOODS BOUGHT IN OWN NAME.

Where an agent, by contracting personally (*y*), renders himself personally liable for the price of goods bought on behalf of his principal, the property in the goods, as between the principal and agent, vests in the agent, and does not pass to the principal until he pays for the goods, or the agent intends that it shall pass (*z*), and the agent has the same rights with regard to the disposal of the goods (*z*), and with regard to stopping them *in transitu* as he would have had if the relation between him and his principal had been that of seller and buyer (*a*).

## Article 77.

## RIGHT TO INTERPLEAD.

Where adverse claims are made upon an agent in respect of any money, goods, or chattels in his

(*y*) See Articles 115 to 120.

(*z*) *Jenkyns v. Brown*, 1849, 14 Q. B. 496; 19 L. J. Q. B. 286; 80 R. R. 287; *Schuster v. M'Kellar*, 1857, 26 L. J. Q. B. 281; 7 E. & B. 704; 110 R. R. 785; *Ex p. Banner, Re Tappenbeck*, 1876, 2 Ch. D. 278; 45 L. J. Bk. 73, C. A. Comp. *Hathesing v. Laing*, 1873, L. R. 17 Eq. 92; 43 L. J. Ch. 233.

(*a*) *Imperial Bank v. London & St. Katharine's Docks*, 1876, 5 Ch. Div. 195; 46 L. J. Ch. 335; *Feise v. Wray*, 1802, 3 East, 93; 6 R. R. 551; *The Tigress*, 1863, B. & L. 38; *Falk v. Fletcher*, 1865, 34 L. J. C. P. 146; 18 C. B. N. S. 403; *Hawkes v. Dunn*, 1831, 1 Tyr. 413; *Snee v. Prescott*, 1743, 1 Atk. 245.

possession, and he claims no interest in the subject-matter of the dispute other than for costs or charges, he may claim relief by way of interpleader (*b*), even as against his own principal whose title he has acknowledged (*c*), provided that he had no notice of the adverse claim at the time of such acknowledgment (*d*). Where the agent claims a lien on property as against the owner, whoever he may be, the lien is not such an interest as deprives him of the right to interplead in respect of the ownership of the property (*e*); but where he claims a lien or any other interest in the property, or part thereof, other than for costs or charges, as against a particular claimant, he is not permitted to interplead (*f*).

#### *Illustrations.*

1. An agent has funds in his hands, upon which a third person claims to have been given a lien by the principal. The agent may interplead as against his principal and the third person (*g*).

(*b*) Rules S. C., 1883, Ord. LVII.; *Blyth v. Whiffin*, 1872, 27 L. T. 330.

(*c*) *Attenborough v. St. Katharine's Docks*, 1878, 3 C. P. D. 450; 47 L. J. C. P. 763, C. A.; *Ex p. Mersey Docks & Harbour Board*, (1899) 1 Q. B. 546; 68 L. J. Q. B. 540, C. A.; Illustrations 1 to 6. It would seem that, in so far as they are decisions to the contrary, *Crawshay v. Thornton*, 1836, 2 Myl. & C. 1; *Cooper v. De Tastet*, 1829, Tamlyn, 177; and *Nickolson v. Knowles*, 1820, 5 Madd. 47, are no longer law since the C. L. P. Act, 1860 (23 & 24 Vict. c. 126).

(*d*) *Ex p. Davies, Re Sadler*, 1881, 19 Ch. Div. 86, C. A.

(*e*) *Attenborough v. St. Katharine's Docks*, *supra*; *Cotter v. Bank of England*, 1833, 3 M. & S. 180.

(*f*) *Mitchell v. Hayne*, 1824, 2 Sim. & S. 63; 25 R. R. 151; *Braddick v. Smith*, 1832, 9 Bing. 84; *Moore v. Usher*, 1835, 7 Sim. 383.

(*g*) *Smith v. Hammond*, 1833, 6 Sim. 10.

2. A. instructs a stockbroker to sell shares, and sends him the share certificate and blank transfers. The shares are claimed by B., who alleges that they were obtained from him by fraud. A. sues the broker, claiming the return of the certificate and transfers. The broker may interplead (*h*).

3. A., a part-owner of a vessel, instructs B., a broker, to insure the vessel. B. receives an amount due under the policy in respect of a loss, and the whole of the amount is claimed by A. A. sues B. for the whole amount, and certain other part-owners sue him for part thereof. B. may interplead (*i*).

4. A. deposits goods with B., a wharfinger, and afterwards requests him to transfer them to the name of C., reserving to himself a right to draw samples. B. enters the goods in C.'s name. D. then claims them as paramount owner, and A. acquiesces in his claim. C. also claims them. B. may interplead as against C. and D. (*k*).

5. A. intrusted a policy to B. for a specified purpose. C., who had pledged the policy with A., and A. each brought an action against B. for the policy. Held, that B. was entitled to interplead (*l*).

6. A., an auctioneer, sells goods on behalf of B., and whilst a portion of the proceeds is still in his hands receives notice of a claim by C. B. sues A. for the balance of the proceeds. A. may interplead as to the residue after the deduction of his expenses and charges (*m*).

(*h*) *Robinson v. Jenkins*, 1890, 6 T. L. R. 69, 158, C. A.

(*i*) *Suart v. Welch*, 1838, 4 Myl. & C. 305.

(*k*) *Mason v. Hamilton*, 1831, 5 Sim. 19; *Pearson v. Cardon*, 1831, 2 Russ. & M. 606; *Ex p. Mersey Docks and Harbour Board*, (1899) 1 Q. B. 546; 68 L. J. Q. B. 540, C. A.

(*l*) *Tanner v. European Bank*, 1865, L. R. 1 Ex. 261; 35 L. J. Ex. 151.

(*m*) *Best v. Hayes*, 1862, 32 L. J. Ex. 129; 3 F. & F. 113; *Martinius v. Helmuth*, 1815, Coop. 245; 13 R. R. 126; *Wright v. Freeman*, 1879, 48 L. J. C. P. 276.

## Article 78.

## RIGHT TO AN ACCOUNT.

Where the accounts between a principal and agent are of so complicated a nature that they cannot be satisfactorily disposed of in an action at law, the agent has a right to have an account taken in a court of equity (*n*); but it does not follow, merely because the principal has such a right, that the agent has a similar right (*o*). Where an agent is paid a salary or commission in proportion to the profits made or the business done, the question whether he is entitled to have an account taken in a court of equity depends upon whether or not the accounts are of too intricate or complicated a nature to be properly and conveniently gone into by a jury (*p*).

## Article 79.

## NO RIGHT TO SUE PRINCIPAL ON CONTRACTS ENTERED INTO ON HIS BEHALF.

Except in the case of insurance brokers, who may sue their principals for premiums due under policies

(*n*) *Padwick v. Hurst*, 1854, 23 L. J. Ch. 657; 18 Beav. 575; *Blyth v. Whiffin*, 1872, 27 L. T. 330.

(*o*) *Padwick v. Stanley*, 1852, 9 Hare, 627; *Diwiddie v. Bailey*, 1801, 6 Ves. 136. Because the right of the principal may be founded on the fiduciary character of the agency.

(*p*) *Harrington v. Churchward*, 1860, 29 L. J. Ch. 521; *Smith v. Leveau*, 1863, 33 L. J. Ch. 167; 1 H. & M. 123; *Waters v. Shaftesbury*, 1866, 14 L. T. 184; *Shepard v. Brown*, 1862, 7 L. T. 499.

effected by them even if they have not paid or settled with the underwriters (*q*), no agent has any right of action against his principal on any contract entered into on the principal's behalf, whether the agent is himself personally liable on the contract to the other contracting party or not (*r*).

### *Illustrations.*

1. A., a foreign merchant, employs B. to buy goods on commission. B. buys the goods, and the vendors invoice them to him and take his acceptance for the price. B. cannot sue A., as for goods sold and delivered (*s*). (His only remedy is an action for indemnity.)

2. A broker buys goods on behalf of an undisclosed principal. He cannot sue the principal for not accepting the goods, although, having contracted without naming the principal, he is, by a custom of trade, personally liable on the contract (*t*). Nor can he sue as for goods bargained and sold (*u*).

(*q*) *Power v. Butcher*, 1829, 8 L. J. K. B. 217; 5 M. & R. 327; 34 R. R. 432.

(*r*) Illustrations 1 and 2.

(*s*) *Seymour v. Pychlau*, 1817, 1 B. & A. 14.

(*t*) *Tetley v. Shand*, 1872, 25 L. T. 658.

(*u*) *White v. Benekendorff*, 1873, 29 L. T. 475; *Ex p. Dyster*, 1816, 2 Rose, 349.

## CHAPTER XI.

RELATIONS BETWEEN THE PRINCIPAL AND THIRD  
PERSONS.

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Sect. 1.—*What acts of agents bind their principals.*

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## Article 80.

ACTS WITHIN ACTUAL OR APPARENT SCOPE OF  
AUTHORITY.

EVERY act done by an agent professedly on the principal's behalf, and within the scope of his actual authority, is binding on the principal with respect to persons dealing with the agent in good faith, even if the act is done fraudulently in furtherance of the agent's own interests, and not in the interest of the principal (*a*).

Every act done by an agent in the course of his employment on behalf of the principal, and within the apparent scope of his authority, binds the principal, unless the agent is in fact unauthorized to do the particular act, and the person dealing with him

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(*a*) Illustration 1.

has notice (*b*) that in doing such act he is exceeding his authority (*c*).

### *Illustrations.*

1. A. is authorized in writing to act as the agent of B. for the purpose of underwriting policies of insurance, and carrying on the ordinary business of underwriting, at Lloyd's, in the name and on behalf of B., in accordance with the usual custom of Lloyd's. A., in his own interests, and in abuse of his authority, underwrites a guarantee policy in B.'s name, the assured acting in good faith, but having no knowledge of the existence of the written authority or of its terms. It is in the ordinary course of business at Lloyd's to underwrite such policies, and A. was therefore acting within the scope of his actual authority, though in fraud of B. B. is bound by the policy, A.'s motive in executing it being immaterial (*d*).

2. An agent was intrusted by his principal with a document containing a written consent signed by the principal to do a particular act, but the agent was told not to give the consent, except on certain conditions which were not specified in the document. The agent consented unconditionally. Held, that the principal was bound, though he had signed the document without having read it (*e*). So, where A. gave B. a power of attorney to charge and transfer in any

(*b*) See Article 87.

(*c*) *Heyworth v. Knight*, 1864, 33 L. J. C. P. 298; 17 C. B. N. S. 298; *Dyas v. Cruise*, 1845, 2 J. & L. 460; 69 R. R. 348, Ir.; *Ex p. Dixon, Re Henley*, 1876, 4 Ch. Div. 133; 46 L. J. Bk. 20; *Waller v. Drakeford*, 1853, 22 L. J. Q. B. 274; 1 El. & Bl. 749; 93 R. R. 377; *Nickson v. Brohan*, 1718, 10 Mod. 109; *Strauss v. Francis*, 1866, L. R. 1 Q. B. 379; 35 L. J. Q. B. 133; *Curlewis v. Birkbeck*, 1863, 3 F. & F. 894; *Wright v. Bigg*, 1852, 15 Beav. 592; 92 R. R. 568. And see Illustrations.

(*d*) *Hambro v. Burnand*, (1904) 2 K. B. 10; 73 L. J. K. B. 669, C. A.

(*e*) *Beaufort v. Neeld*, 1845, 12 C. & F. 248, H. L.

form whatever any estate, &c., "following A.'s letters of instructions and private advices which, if necessary," should "be considered part of these presents," it was held that A. was bound by a mortgage on his property executed by B., although as between A. and B. the mortgage was not authorized (*f*). So, where a principal wrote—"I have authorized A. to see you, and, if possible, to come to some amicable arrangement"—and gave A. private instructions not to settle for less than a certain amount, it was held that he was bound by A.'s settlement for less than that amount, the instructions not having been communicated to the other side (*g*). No private instructions given to an agent, of which the persons dealing with him have no notice, prevent the acts of the agent, within the scope of his ostensible authority, from binding the principal (*h*).

3. A. gives B. a signed form of promissory note or acceptance in blank, with authority on certain conditions to fill it up and convert it into a bill of exchange or promissory note for a certain amount. B. fills it up in breach of the conditions and for a larger amount than was authorized, and negotiates it to C., who takes it in good faith and for value, without notice of the circumstances. A. is liable to C. on the bill or note as filled up (*i*). Otherwise, if C. had had notice of the circumstances under which the document was issued (*k*), or if B. had not been authorized to fill up or negotiate the

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(*f*) *Davy v. Waller*, 1899, 81 L. T. 107.

(*g*) *Trickett v. Tomlinson*, 1863, 13 C. B. N. S. 663.

(*h*) *National Bolivian Navigation Co. v. Wilson*, 1880, 5 App. Ca. 176, 209, H. L.; *Smith v. M'Guire*, 1858, 3 H. & N. 554; 27 L. J. Ex. 465; 117 R. R. 853; *Whitehead v. Tuckett*, 1812, 15 East, 400; 13 R. R. 509; *Fuentes v. Montis*, 1868, L. R. 3 C. P. 268, 277.

(*i*) *Lloyd's Bank v. Cooke*, (1907) 1 K. B. 794; 76 L. J. K. B. 666, C. A.; *Montague v. Perkins*, 1853, 22 L. J. C. P. 187; 94 R. R. 862; 45 & 46 Vict. c. 61, s. 20. Comp. *Baxendale v. Bennett*, 1878, 3 Q. B. D. 525; 47 L. J. Q. B. 624, C. A.; *Watkin v. Lamb*, 1901, 85 L. T. 483.

(*k*) *Hatch v. Searles*, 1854, 24 L. J. Ch. 22.



instrument except on the receipt of instructions from A. in that behalf (*l*).

4. A resident agent and manager of an unincorporated mining company orders goods which are necessary for working the mine. The shareholders are liable for the price, though the regulations of the company provide that all goods shall be purchased for cash, and no debt shall be incurred, unless the person supplying the goods had notice that the agent was exceeding his authority (*m*).

5. An agent was employed as manager of a business, which he carried on apparently as principal. It was incidental to the ordinary course of the business to draw and accept bills of exchange, but it had been expressly agreed between the principal and agent that the agent should not draw or accept bills of exchange on the principal's behalf. The agent accepted a bill, in the name in which the business was carried on. Held, that the principal was liable on the bill (*n*). So, a horsedealer is bound by a warranty given by his agent for the sale of a horse (*o*), and a client by a compromise entered into by his solicitor, in the course of his employment (*p*), even if the warranty was given, or the compromise was entered into, contrary to his express instructions, with respect to persons having no notice of such instructions.

6. An agent was given authority, in cases of emergency, to borrow money on exceptional terms outside the ordinary course of business. A third person, in good faith and without notice that the agent was exceeding his authority, lent money to him on such exceptional terms. Held, that the principal

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(*l*) *Smith v. Prosser*, (1907) 2 K. B. 735; 77 L. J. K. B. 71, C. A.

(*m*) *Hawken v. Bourne*, 1841, 8 M. & W. 703; 58 R. R. 853.

(*n*) *Edmunds v. Bushell*, 1865, L. R. 1 Q. B. 97; 35 L. J. Q. B. 20.

(*o*) *Howard v. Sheward*, 1866, L. R. 2 C. P. 148; 36 L. J. C. P. 42.

(*p*) *Butler v. Knight*, 1867, L. R. 2 Ex. 109; 36 L. J. Ex. 66;

*Smith v. Tromp*, 1849, 7 C. B. 757; 18 L. J. C. P. 209; 78 R. R. 824.

was bound, although in the particular case the emergency had not arisen (*q*).

7. An auctioneer is instructed to sell a pony by auction, a reserve price being fixed. By mistake he sells it without reserve. The principal is bound by the sale, subject to the provisions of the 4th section of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) (*r*), unless the conditions of sale expressly provide that the lot is offered subject to a reserve price (*s*).

8. A solicitor is authorized to sue for a debt. A tender of the debt to his managing clerk operates as a tender to the client, even if the clerk was instructed not to receive payment of the particular debt, unless at the time of the tender he disclaims any authority to receive the money (*t*).

9. A. claims 50*l.* from B. for the use and occupation of certain premises, and authorizes B. to pay the amount to C. B. calls on C. and expresses his readiness to pay the amount, but C. refuses to accept it, and claims a larger sum. There is a concluded agreement between A. and B. to settle the claim for 50*l.*, and A. cannot maintain an action for a larger sum (*u*).

10. The manager of a business, which he carried on in his own name as apparent principal, ordered goods for the business. Held, that the undisclosed principal was liable for the

(*q*) *Montaignac v. Shitta*, 1890, 15 A. C. 357. See also *Bryant v. Quebec Bank*, (1893) A. C. 179; 62 L. J. P. C. 73, P. C.

(*r*) *Rainbow v. Howkins*, (1904) 2 K. B. 322; 73 L. J. K. B. 641.

(*s*) *McManus v. Fortescue*, (1907) 2 K. B. 1; 76 L. J. K. B. 393, C. A.

(*t*) *Moffatt v. Parsons*, 1814, 1 Marsh. 55; 15 R. R. 506; *Bingham v. Allport*, 1833, 2 L. J. K. B. 86; 1 N. & M. 398; 38 R. R. 385; *Kirton v. Braithwaite*, 1836, 1 M. & W. 310; *Wilmot v. Smith*, 1828, 3 C. & P. 453; 31 R. R. 732; *Goodlund v. Blewitt*, 1808, 1 Camp. 477; 10 R. R. 731; *Finch v. Boning*, 1879, 4 C. P. D. 143; *Watson v. Hetherington*, 1843, 1 C. & K. 36; 70 R. R. 775.

(*u*) *Gretton v. Mees*, 1878, 7 Ch. D. 839; *Field v. Boland*, 1837, 1 Dr. & Wal. 37; 56 R. R. 150.

price of the goods, although in ordering them the manager had exceeded his actual authority (*x*).

11. A broker was permitted by his principal, on several occasions, to draw bills in his own name for the price of goods sold on the principal's behalf. A purchaser accepted a bill so drawn, having previously paid in a similar manner for goods supplied to him. Held, that the principal was bound by the payment, although the broker became bankrupt before the maturity of the bill (*y*).

12. A., an iron-dealer, on one occasion sent B., a water-man, to buy iron on credit from C., and in due course paid C. for it. On a subsequent occasion he sent him with ready money, but B. again bought on credit and misappropriated the money. Held, that A. was liable to C. for the price of the iron bought on the second occasion, B. apparently having authority to pledge his credit (*z*).

13. The assignee of a life policy which was voidable if the assured went beyond Europe, in paying the premiums to the local agent of the assurance company, told him that the assured was in Canada. The agent said that that would not avoid the policy, and continued to receive the premiums until the death of the assured. Held, that the company was estopped by the representation of its agent from saying that the policy was avoided by the absence of the assured (*a*).

(*x*) *Watteau v. Fenwick*, (1893) 1 Q. B. 346. But see *Kinahan v. Parry*, (1911) 1 K. B. 459; 80 L. J. K. B. 276. C. A.

(*y*) *Townsend v. Inglis*, 1816, Holt, 278; 17 R. R. 636; *Meyer v. Sze Hai Tong Banking, &c. Co.*, (1913) A. C. 847; 83 L. J. P. O. 103.

(*z*) *Hazard v. Treadwell*, 1730, 1 Str. 506. *Comp. Barrett v. Irvine*, (1907) 2 Ir. R. 462, C. A.

(*a*) *Wing v. Hurvey*, 1854, 23 L. J. Ch. 511; 5 De G. M. & G. 265; 104 R. R. 112. See also *Mackie v. European Ass. Society*, 1869, 21 L. T. 102; *Re Economic Fire Office*, 1896, 12 T. L. R. 142; *London Freehold, &c. Co. v. Suffield*, (1897) 2 Ch. 608; 66 L. J. Q. B. 790, C. A.; *Refuge Ass. Co. v. Kettlewell*, (1909) A. C. 243; 78 L. J. K. B. 519, H. L.

So, where a shipmaster signed a bill of lading containing a statement that the freight had been paid, it was held that the owners were estopped from claiming the freight from an indorsee for value of the bill of lading (b).

14. The directors of a company, having power to borrow such sums of money on the company's behalf as are authorized by resolution in general meeting, borrow 1,000*l.* upon a bond under the seal of the company without the requisite resolution having been passed. The company is liable on the bond, unless the lender had notice of the irregularity (c). Where an act is done by directors within the scope of their powers, third persons are entitled to assume that all the necessary formalities and conditions have been duly complied with, unless they have notice of any irregularity (d). So, where the directors of a company had authority to delegate such of their powers as they thought fit to a managing director, it was held that the company was bound by the acts, within the scope of such powers, of a person who acted to their knowledge as managing director, though there was no other evidence that he had been duly appointed, or that the powers of the directors had been delegated to him, the

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(b) *Howard v. Tucker*, 1831, 1 B. & Ad. 712; 35 R. R. 418. See also *Compania Naviera Vasconzada v. Churchill*, (1906) 1 K. B. 237; 75 L. J. K. B. 94.

(c) *Royal British Bank v. Turquand*, 1856, 6 E. & B. 327; 25 L. J. Q. B. 317; 103 R. R. 461, Ex. Ch.; *Agar v. Atheneum Ass. Society*, 1858, 27 L. J. C. P. 95; 3 C. B. N. S. 725; 111 R. R. 817.

(d) *Gloucester Bank v. Rudry, &c. Colly. Co.*, (1895) 1 Ch. 629; 64 L. J. Ch. 451, C. A.; *Bargate v. Shortridge*, 1855, 5 H. L. Cas. 297; 24 L. J. Ch. 457; 101 R. R. 163; *Re Land Credit Co.*, 1869, L. R. 4 Ch. 460; 39 L. J. Ch. 27; *Duck v. Tower, &c. Co.*, (1901) 2 K. B. 314; 70 L. J. K. B. 625; *Montreal, &c. Co. v. Robert*, (1906) A. C. 196; 75 L. J. P. C. 33, P. C. This principle does not apply where the regulations of the company are registered, and the act done by the directors is on the face of it in excess of their authority as disclosed by those regulations, because persons dealing with companies are deemed to have notice of their registered regulations: *Balfour v. Ernest*, 1859, 28 L. J. C. P. 170; 5 C. B. N. S. 601; 116 R. R. 788.

person dealing with him having acted in good faith and without notice of any want of authority (e).

15. The directors of a company borrow money within the limits of their borrowing powers. The lender is under no obligation to inquire for what purposes the money is borrowed, and the company is bound by the loan, though it was borrowed and is applied for purposes which are *ultra vires*, unless the lender had notice of the improper nature of the transaction (f).

16. A., a solicitor, being intrusted with 4,000*l.* to be lent on a mortgage, fraudulently retained 500*l.*, and told the mortgagor's solicitor that he was retaining it until a question as to the title was settled. A. having become bankrupt, it was held that the mortgagor was entitled to redeem the property on payment of 3,500*l.*, with interest, though the mortgage deed acknowledged the receipt of 4,000*l.*, the retention of the 500*l.* being within the apparent scope of A.'s authority (g).

#### Article 81.

NOT BOUND BY ACTS BEYOND SCOPE OF AUTHORITY, OR  
NOT DONE IN COURSE OF EMPLOYMENT.

No principal is bound by any act of his agent which is not done in the course of the agent's employment on his behalf (h), or by any act which is not within the apparent scope of the agent's

(e) *Biggerstaff v. Rowatt's Wharf*, (1896) 2 Ch. 93; 65 L. J. Ch. 536, C. A.

(f) *Re Payne, Young v. Payne*, (1904) 2 Ch. 608; 73 L. J. Ch. 849, C. A.

(g) *Boyd v. Craster*, 1864, 10 L. T. 480.

(h) Illustrations 1 and 2. And see *Tobin v. Crawford*, 1842, 9 M. & W. 716; 52 R. R. 695, Ex. Ch.; *Bank of Scotland v. Watson*, 1813, 1 Dow, 40; 14 R. R. 11, H. L.; *Rhodes v. Moules*, (1895) 1 Ch. 236; 64 L. J. Ch. 122, C. A.

authority, unless the principal in fact authorized the agent to do the particular act (*i*).

This article is subject to the provisions of Articles 82 to 85.

### *Illustrations.*

1. A. agreed with a company to become surety for a debt owing by B., and indorsed a bill to the company for the amount, it being understood that he was to have funds to meet the bill out of a debt accruing due to B. from C. The managing director of the company, who knew of this arrangement between A. and B., had previously lent money privately to B., and held his acceptance. When the acceptance became due, the managing director obtained an order from B. for the payment to him of the debt due from C., and appropriated this payment to his own private debt. In an action by the company against A. on the bill indorsed by him as surety, it was held that the company was not responsible for the acts of the managing director in obtaining payment of his private debt, such acts not being done in the course of his employment on behalf of the company (*k*).

2. The secretary of a company, who has authority to give acknowledgments and certifications in respect of share certificates lodged with the company, fraudulently certifies that

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(*i*) Illustrations 3 to 16. *Olding v. Smith*, 1852, 16 Jur. 497; *Graves v. Masters*, 1883, 1 C. & E. 73; *Fitzgerald v. Dressler*, 1859, 29 L. J. C. P. 113; 7 C. B. N. S. 374; *Attwood v. Munnings*, 1827, 7 B. & C. 278; 31 R. R. 194; *Att.-Gen. v. Jackson*, 1846, 5 Hare, 365; *Fenn v. Harrison*, 1790, 3 T. R. 757; *Levy v. Richardson*, 1889, 5 T. L. E. 236; *Kendal v. Wood*, 1870, L. R. 6 Ex. 243; 39 L. J. Ex. 167, Ex. Ch.; *Brsttel v. Williams*, 1849, 4 Ex. 623; 19 L. J. Ex. 121; 80 B. R. 726; *Sickens v. Irving*, 1859, 29 L. J. C. P. 25; 7 C. B. N. S. 165; *Byrne v. Londonderry Tramway Co.*, (1902) 2 Ir. R. 457, C. A. See also Article 38, Illustration 13; Article 99, Illustrations 12 to 17; Article 105, Illustrations 1 and 2.

(*k*) *McGowan v. Dyer*, 1873, L. R. 8 Q. B. 141; *Watkin v. Lamb*, 1901, 85 L. T. 483.

certain certificates have been lodged, when in fact, as he knows, the transfers were lodged without the certificates, and the proposed transferee acts to his detriment on the faith of the certification. The company is not estopped from setting up the true facts, and showing that the proposed transferor had no shares to transfer (*l*). So, where the secretary of a company borrowed money for his own purposes on the security of a certificate, certifying that certain nominees of the lenders were registered as transferees of certain shares in the company, the certificate being in proper form and under seal, but the seal having been affixed fraudulently, and the signatures of the directors forged by the secretary, it was held that the company was not estopped from disputing the title of the lenders to the shares, nor responsible to them in any way for the fraudulent acts of the secretary (*m*). A secretary authorized to deliver certificates of shares is not thereby held out as having authority to warrant their genuineness (*m*).

3. The manager and director of the business, in South America, of a company, gave a promissory note in the name of the company. It was not shown that it was necessary, or in the ordinary course of business of such a company, when carried on in the usual way, to give promissory notes. Held, that the company was not bound by the note (*n*).

4. The local agent of an insurance company contracted on behalf of the company to grant a policy. Held, that it was not within the ordinary scope of the authority of such an

(*l*) *Whitechurch v. Cavanagh*, (1902) A. C. 117; 71 L. J. K. B. 400, H. L.

(*m*) *Ruben v. Great Fingall Consolidated*, (1906) A. C. 439; 75 L. J. K. B. 843, H. L. *Shaw v. Port Philip Mining Co.*, 1884, 13 Q. B. D. 103; 15 L. J. Q. B. 369, is probably not law. *Comp. Balkis Consolidated Co. v. Tomkinson*, (1893) A. C. 396; 63 L. J. Q. B. 134, H. L.; *Re Ottos Kopje Diamond Mines*, (1893) 1 Ch. 618; 62 L. J. Ch. 166; *Longman v. Bath Tramways*, (1905) 1 Ch. 646; 74 L. J. Ch. 424, C. A.; *Dixon v. Kennaway*, (1900) 1 Ch. 833; 69 L. J. Ch. 501.

(*n*) *Re Cunningham, Simpson's claim*, 1887, 36 Ch. Div. 532; 57 L. J. Ch. 169.

agent to make such a contract, and that, therefore, the company was not bound by the contract, unless it could be shown that the agent was, in fact, authorized to make it (o). So, an insurance company is not bound by the acceptance of a premium by its agent after the time for payment of the premium has expired (p). So, where a house or estate agent who is employed to procure a purchaser at a certain price enters into a contract of sale, the principal is not bound unless he in fact authorized the agent to make the contract on his behalf, because it is not within the ordinary scope of such an agent's authority to enter into binding contracts on his principal's behalf (q).

5. A stockbroker who was authorized to sell stock, in good faith, for the benefit of the principal, sold it on credit. Held, that the principal was not bound by the contract, he not having expressly authorized a sale on credit, because it is not usual to sell stock on such terms (r).

6. The manager of a public-house, who had authority to deal with particular persons only, bought spirits from a person with whom he had no authority to deal. Held, that the principal was not bound, it being usual for such managers to be restricted to particular persons from whom to purchase spirits (s).

7. A bank manager guarantees the payment of a certain

(o) *Linford v. Provincial, &c. Ins. Co.*, 1864, 34 Beav. 291. See also *Comerford v. Britannic Assurance Co.*, 1908, 24 T. L. R. 593. *Comp. Holdsworth v. Lancs. & Yorks. Ins. Co.*, 1907, 23 T. L. R. 521, and *Refuge Ass. Co. v. Kettlewell*, (1909) A. C. 243; 78 L. J. K. B. 519.

(p) *Acey v. Fernie*, 1840, 7 M. & W. 151; 56 R. R. 671. See also *London and Lancs. Ass. Co. v. Fleming*, (1897) A. C. 499; 66 L. J. P. C. 116.

(q) *Chadburn v. Moore*, 1892, 61 L. J. Ch. 674; *Hamer v. Sharp*, 1874, L. R. 19 Eq. 108; 44 L. J. Ch. 53; *Prior v. Moore*, 1887, 3 T. L. R. 624; *Thuman v. Best*, 1907, 97 L. T. 239. *Comp. Rosenbaum v. Belson*, (1900) 2 Ch. 267; 69 L. J. Ch. 569.

(r) *Wiltshire v. Sims*, 1808, 1 Camp. 258; 10 R. R. 673.

(s) *Daun v. Simmins*, 1879, 41 L. T. 783, Q. A. See also *Kinahau v. Parry*, (1911) 1 K. B. 459; 80 L. J. K. B. 276, C. A.; and compare *Watteau v. Fenwick*, (1893) 1 Q. B. 346.



draft. It is not within the ordinary scope of a bank manager's authority to give such a guarantee, and the bank therefore is not liable thereon unless he was expressly authorized to give it (*t*).

8. A. gave authority to B., an insurance broker in Liverpool, to underwrite policies of marine insurance in his name, the risk not to exceed 100*l.* by any one vessel. B. underwrote a policy for 150*l.* on A.'s behalf. The assured was not aware of the limitation on B.'s authority, but it was notorious in Liverpool that in nearly all such cases certain limits were fixed. Held, that A. was not liable on the policy (*u*).

9. An insurance broker, being authorized to effect an insurance, agreed with a company for a policy on certain terms. The policy was duly executed by the company, and retained to await the application of the broker, who was debited with the amount of the premium. The broker, having been paid the premium by his principal, told the company that the insurance was a mistake, and fraudulently cancelled the policy without the principal's authority. Held, that the principal was entitled to enforce the contract as against the company, it not being part of a broker's ordinary authority to cancel contracts made by him (*x*).

10. A proposer for an insurance policy permitted an agent of the insurance company to invent the answers to questions which were intended to form the basis of the contract, and to send them to the company as answers of the proposer. Held, that in answering the questions the agent acted as the agent of the proposer and not of the company, and some of the answers being false, that the proposer could not claim under a policy granted by the company, though the proposer did

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(*t*) *Re Southport Banking Co.*, 1885, 1 T. L. R. 204. See also *Banbury v. Bank of Montreal*, (1917) 1 K. B. 409; 86 L. J. K. B. 380, C. A.; 34 T. L. R. 518, H. L.

(*u*) *Baines v. Ewing*, 1866, L. R. 1 Ex. 320; 35 L. J. Ex. 194.

(*x*) *Xenos v. Wickham*, 1866, L. R. 2 H. L. 296; 36 L. J. C. P. 113, H. L.

not specifically authorize the agent to answer falsely, and did not know that he had done so (*y*).

11. A principal, who is in the habit of paying cash for goods bought by his agent, gives the agent money to buy goods. The agent buys the goods on credit and misappropriates the money. The principal is not liable for the price of the goods (*z*).

12. A partner, who is given authority to settle the affairs of the partnership on the winding-up thereof, draws a bill of exchange in the name of the firm. The other partners are not liable on the bill, unless they expressly authorized him to bind them by drawing bills (*a*).

13. The secretary of a company fraudulently, and without the knowledge of the directors, represented to A. that if he took certain shares he would be appointed solicitor to the company, and subsequently that he had been so appointed. A., on the faith of the representations, applied for the shares, and they were allotted to him in the usual way. Held, that A. was bound by the contract to take the shares, the representations being quite outside the scope of the secretary's employment. The duties of a secretary are *primâ facie* clerical and ministerial only, and it is not within the ordinary course of his employment to induce persons to take shares, nor to make any bargains or conditions as to taking shares (*b*). So, where the secretary of a tramway company made a representation as to the financial relations of the company, and

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(*y*) *Biggar v. Rock Life Ass. Co.*, (1902) 1 K. B. 516; 71 L. J. K. B. 79; *Life and Health Ass. Assn. v. Yule*, 1904, 6 F. 437; *M'Millan v. Accident Ass. Co.*, (1907) S. C. 484; *Connors v. London and Provincial Ass. Co.*, 1913, 47 Ir. L. T. 148.

(*z*) *Stubbing v. Heintz*, 1791, 1 Peake, 66; 3 R. R. 651; *Rusby v. Scarlett*, 1803, 5 Esp. 76; *Pearce v. Rogers*, 1800, 3 Esp. 214.

(*a*) *Kilgour v. Finlyson*, 1789, 1 H. Bl. 156; *Abel v. Sutton*, 1800, 3 Esp. 108; 6 R. R. 818. *Comp. Smith v. Winter*, 1838, 4 M. & W. 454; 8 L. J. Ex. 34; 51 R. R. 678.

(*b*) *Newlands v. Employers' Accident Association*, 1885, 54 L. J. Q. B. 428, C. A. As to representations by promoters, see *Lynde v. Anglo-Italian Hemp. Co.*, (1896) 1 Ch. 178; 65 L. J. Ch. 96, C. A.

it was not shown that he was authorized to make the representation, it was held that the company was not bound, it not being part of the ordinary duties of such secretary to make any representations whatever on behalf of the company (c). But a principal is not entitled to retain the benefit of a contract induced by the misrepresentations, though unauthorized, of his agent, and therefore, where premiums were paid on a policy on the faith of untrue statements by an agent of the insurance company, it was held that the company was liable to repay all the premiums paid after the making of the misrepresentations, though the agent had no authority to make them (d).

14. A company declared dividends which were not warranted by its financial condition. A law agent (who was also a member) of the company mentioned the dividends to A. as proof of the flourishing condition of the company, and on the faith of his representations A. purchased shares. Held, that A. was bound by his contract to take the shares, it not being in the ordinary course of a law agent's employment to make representations as to the financial state of the company (e).

15. A steward, who was instructed to find a tenant for a vacant farm, but to consult with his principal before granting a lease, entered into an agreement to let the farm for twelve years, without consulting the principal. Held, that the principal was not bound by the agreement (f).

16. A principal cannot commit an act of bankruptcy by

(c) *Barnett v. South London Tram. Co.*, 1887, 18 Q. B. D. 815; 56 L. J. Q. B. 452, C. A.; *New Brunswick Rail. Co. v. Conybeare*, 1862, 9 H. L. Cas. 711; 31 L. J. Ch. 297, H. L.; *Ex p. Frowd*, 1861, 3 L. T. 843.

(d) *Refuge Ass. Co. v. Kettlewell*, (1909) A. C. 243; 78 L. J. K. B. 519, H. L.; *Hughes v. Liverpool, &c. Socy.*, (1916) 2 K. B. 482; 85 L. J. K. B. 1643, C. A.

(e) *Burnes v. Pennell*, 1849, 2 H. L. Cas. 497; 81 R. R. 244, H. L.

(f) *Collen v. Gardner*, 1856, 21 Beav. 540; 111 R. R. 195.

an unauthorized act of his agent, done without his knowledge (*g*).

### Article 82.

#### DISPOSITIONS BY AGENTS INTRUSTED WITH APPARENT OWNERSHIP OR TITLE-DEEDS OF PROPERTY.

Where a principal, by words or conduct, represents or permits it to be represented that his agent is the owner of any property, any sale, pledge, mortgage, or other disposition for value of the property by the agent is as valid against the principal as if the agent were the owner thereof, with respect to any person dealing with him on the faith of any such representation (*h*).

Where a principal intrusts his agent with the possession of the title-deeds of any property, and authorizes him to raise money on the security thereof, any security given by the agent on the property for money advanced, though for a larger amount than he was authorized to raise, is valid against the principal, provided that the person taking the security acts in good faith, and without notice that the agent has not authority to give the same (*i*).

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(*g*) *Ex p. Blain, Re Sawers*, 1879, 12 Ch. Div. 522, C. A.

(*h*) Illustrations 1 and 2. And see cases cited in note (*k*), *infra*.  
Comp. *Farquharson v. King*, (1902) A. C. 325; 71 L. J. K. B. 667, H. L.

(*i*) Illustration 3. See also *Gordon v. James*, 1885, 30 Ch. D. 249, C. A.; *King v. Smith*, (1900) 2 Ch. 425; 69 L. J. Ch. 598; *London Freehold, &c. Co. v. Suffield*, (1897) 2 Ch. 608; 66 L. J. Ch. 790, C. A.

Where a mortgagee of property permits the mortgagor to have possession of the title-deeds for the purpose of giving a security on the property, any security for value given by the mortgagor thereon has priority to the claim of the mortgagee, provided that the person taking the security acts in good faith, and without notice of the mortgage (*k*).

Provided always that no right or title can be acquired under or by means of any forged instrument (*l*).

### *Illustrations.*

1. A., through the agency of B., a broker, obtained a loan on a mortgage of stock, and afterwards permitted the security to be transferred to B.'s banker, who had no notice of A.'s title and believed that B. was the owner of the stock. B. sold the stock, which was transferred by the banker to the purchaser, and, having paid off the loan, converted the balance to his own use. Held, that A. had no remedy against the banker (*m*).

*Hooper v. Herts*, (1906) 1 Ch. 549; 75 L. J. Ch. 253, C. A.; *Powell v. Browne*, 1908, 97 L. T. 854, C. A.

(*k*) *Perry-Herrick v. Atwood*, 1857, 2 De G. & J. 21; 119 R. R. 10; *Briggs v. Jones*, 1870, L. R. 10 Eq. 92; *Clarke v. Palmer*, 1882, 21 Ch. D. 124; 51 L. J. Ch. 634. *Comp. Colyer v. Finch*, 1856, 5 H. L. Cas. 905; 26 L. J. Ch. 65; 101 R. R. 442, H. L.; *Northern Counties Ins. Co. v. Whipp*, 1884, 26 Ch. D. 482; 53 L. J. Ch. 629, C. A.; *Hunt v. Elmes*, 1861, 30 L. J. Ch. 255; *Cotley v. Nat. Prov. Bank*, 1904, 20 T. L. R. 607.

(*l*) Illustrations 4 and 5. *Esdaile v. La Nauze*, 1840, 1 Y. & C. 394; 4 L. J. Ex. Eq. 46; 41 R. R. 299. Article 81, Illustration 2.

(*m*) *Marshall v. Nat. Prov. Bank*, 1892, 61 L. J. Ch. 465; *Bentinch v. L. J. S. Bank*, (1893) 2 Ch. 120; 62 L. J. Ch. 358. See also *Fuller v. Glyn*, (1914) 2 K. B. 168; 83 L. J. K. B. 764. *Comp. Jameson v. Union Bank of Scotland*, 1913, 109 L. T. 850.

2. A broker, having effected an insurance policy in his own name, was permitted to retain possession thereof for the purpose of receiving the proceeds. The broker pledged the policy. Held, that the pledgee was entitled, as against the principal, to retain the advance out of the proceeds of the policy (*n*).

3. An owner of certain deeds intrusts them to an agent, with authority to pledge them for a certain sum. The agent pledges them for a larger sum to a person who takes them in good faith, and without notice of the limit on the agent's authority. The owner is not entitled to recover the deeds, except on repayment of the full amount advanced upon them (*o*).

4. A solicitor is employed to obtain a loan of 100*l.* on a mortgage of certain property, and is intrusted with the title-deeds for that purpose. He forges the client's signature to a mortgage deed for 400*l.*, and misappropriates the whole sum. The mortgage is void, and the client is not liable to the mortgagee, even to the extent of 100*l.* (*p*).

5. A corporation negligently allows its secretary to have the custody of its common seal. The secretary affixes the seal to a forged power of attorney, under which stock belonging to the corporation is transferred. The corporation is not bound by the transfer (*q*).

(*n*) *Cullow v. Kelson*, 1862, 10 W. R. 193.

(*o*) *Brocklesby v. Temperance Building Society*, (1895) A. C. 173; 64 L. J. Ch. 433, H. L.; *Tottenham v. Green*, 1863, 1 N. R. 466; *Robinson v. Montgomery Brewery*, (1896) 2 Ch. 841; *Rimmer v. Webster*, (1902) 2 Ch. 163; 71 L. J. Ch. 561; *Fry v. Smellie*, (1912) 3 K. B. 282; 81 L. J. K. B. 1003, C. A.

(*p*) *Painter v. Abil*, 1863, 33 L. J. Ex. 60; 2 H. & C. 113; *Fox v. Hawks*, 1879, 13 Ch. D. 822; 49 L. J. Ch. 579.

(*q*) *Bank of Ireland v. Evans' Trustees*, 1855, 5 H. L. Cas. 389; 101 R. R. 218; *Merchants of Staple v. Bank of England*, 1888, 21 Q. B. D. 160; 57 L. J. Q. B. 418, C. A.; *Lewes Laundry Co. v. Barclay*, 1906, 22 T. L. R. 737. And see Article 81, Illustration 2.

## Article 83.

## DEALINGS WITH MONEY AND NEGOTIABLE SECURITIES.

Where an agent, in consideration of an antecedent debt or liability, or for any other valuable consideration, pays or negotiates money or negotiable securities in his possession to a person who receives the same in good faith and without notice that the agent has not authority to so pay or negotiate the same, the payment or negotiation is as valid as if it had been expressly authorized by the owner of the money or securities.

A thing is deemed to be done in good faith within the meaning of this article when it is in fact done honestly, whether it is done negligently or not (*r*).

*Illustrations.*

1. A., having bought on the Stock Exchange scrip which was issued in England by the agent of a foreign government, and which purported to entitle the bearer, on payment of 100*l.*, to receive a bond for that amount, intrusted the scrip to a broker. The broker pledged the scrip as security for a debt owing by himself, the pledgee taking it in good faith and without notice that the broker was not authorized to so pledge it. Held, that, the scrip being negotiable in the same manner as the bond which it represented would

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(*r*) 45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882). s. 90; *Goodman v. Harvey*, 1836, 4 A. & E. 870; 43 R. R. 507; *Raphael v. Bank of England*, 1855, 25 L. J. C. P. 33; 17 C. B. 161; 104 R. R. 638; *Jones v. Gordon*, 1877, 2 A. C. 616, H. L. Illustration 2. As to notice, see Article 87.

be, the pledgee acquired a good title, as against A., to the extent of the pledge (s).

2. A broker fraudulently pledged with a banker negotiable securities belonging to various principals, as security, *en bloc*, for an advance. The banker acted in good faith, but had no knowledge whether the securities were the property of the broker, or whether he had authority to pledge them, or not, and made no inquiries. Held, that the banker had a good title to the securities, as against the principals, to the extent of the advance (t). Every person who takes negotiable securities for valuable consideration, and in good faith, acquires a good title, although the person who negotiates them has no authority to do so (t).

3. An auctioneer, in the ordinary course of business, and not in breach of trust, paid the proceeds of sales into his own account at a bank. The bankers retained the amounts so paid in for an overdraft of the auctioneer, and closed the account. Held, that the principal had no remedy against the bankers, although they had notice that the money was substantially the proceeds of sales. Otherwise, if the auctioneer had been guilty of a breach of trust in so paying in the money, and the bankers had been aware of that (u). So, a banker is entitled to set off what is due to

(s) *Goodwin v. Robarts*, 1876, 1 A. C. 476; 45 L. J. Ex. 748, H. L.; *Rumball v. Metropolitan Bank*, 1877, 2 Q. B. D. 194; 46 L. J. Q. B. 346; *Wookey v. Pole*, 1820, 4 B. & A. 1; 22 R. R. 594; *Edelstein v. Schuler*, (1902) 2 K. B. 144; 71 L. J. K. B. 572; *Bechuanaland, &c. Co. v. London Trading Bank*, (1898) 2 Q. B. 658; 67 L. J. Q. B. 986.

(t) *London Joint Stock Bank v. Simmons*, (1892) A. C. 201; 61 L. J. Ch. 723, H. L.; *Bentinck v. London Joint Stock Bank*, (1893) 2 Ch. 120; 62 L. J. Ch. 358; *Mutton v. Peat*, (1900) 2 Ch. 79; 69 L. J. Ch. 484, C. A.; *Lloyds Bank v. Swiss Bankverein*, 1913, 108 L. T. 143, C. A. *Comp. Sheffield v. London Joint Stock Bank*, 1888, 13 A. C. 333; 57 L. J. Ch. 986, H. L.

(u) *Marten v. Rocke*, 1885, 53 L. T. 946; *Thomson v. Clydesdale Bank*, (1893) A. C. 282; 62 L. J. P. C. 91, H. L. Sc.; *Shields v. Bank of Ireland*, (1901) 1 Ir. R. 222. And see Article 110, Illustration 3; Article 135.



a customer on one account against what is due from him on another, though the money so set off may be trust money, if the banker has no notice of the trust (*x*).

#### Article 84.

##### SALES IN MARKET OVERT.

Where an agent sells goods in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided that he buys them in good faith and without notice of any want of authority on the part of the agent (*y*).

#### Article 85.

##### DISPOSITIONS PROTECTED BY THE FACTORS ACT, 1889.

Where a mercantile agent (*z*) is permitted (*a*) by the owner of goods (*b*) to have possession (*c*) of the goods, or of the documents of title (*d*) thereto, any

(*x*) *Union Bank of Australia v. Murray-Aynsley*, (1898) A. C. 693, P. C.; *Bank of New South Wales v. Goulburn Valley Butter Factory*, (1902) A. C. 543; 71 L. J. P. C. 112.

(*y*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 22 (1).

(*z*) For definition of mercantile agent, see Article 2.

(*a*) See *Buines v. Swainson*, 1863, 4 B. & S. 270; 32 L. J. Q. B. 281.

(*b*) The expression "goods" does not include certificates of stock: *Freeman v. Appleyard*, 1862, 32 L. J. Ex. 175; 1 N. R. 30.

(*c*) A person is deemed to be in possession of the goods or documents when they are in his actual custody, or are held by any other person subject to his control, or for him, or on his behalf: sect. 1 (2).

(*d*) "Documents of title" include any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or pur-

sale, pledge (*e*), or other disposition (*f*) of the goods for valuable consideration, made by him when acting in the ordinary course of business of a mercantile agent (*g*) while the goods or documents of title, or any other documents of title to the goods obtained by means of the goods or of the first-mentioned documents of title, are in his possession is, as between the owner of the goods and the person taking under the disposition, as valid as if the agent were expressly authorized by the owner to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the agent has not authority to make the same, or that the goods or documents of title are in possession of the agent without the consent (*h*) of the owner, if such be the fact (*i*).

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porting to authorize, either by indorsement or delivery, the possessor of the document to transfer or receive goods thereby represented: sect. 1 (4).

(*e*) "Pledge" includes any contract pledging or giving a lien or security on goods, whether in consideration of an original advance, or of any further or continuing advance, or of any pecuniary liability: sect. 1 (5). See *Jewan v. Whitworth*, 1866, L. R. 2 Eq. 692; 36 L. J. Ch. 127; *Sheppard v. Union Bank*, 1862, 31 L. J. Ex. 154; 7 H. & N. 661.

(*f*) Entrusting goods to an auctioneer for sale is not a pledge or other disposition within the meaning of the Act, though the auctioneer makes advances on the goods: *Waddington v. Neale*, 1907, 96 L. T. 786.

(*g*) See note to this Article, p. 295, *post*.

(*h*) In *Oppenheimer v. Frazer*, (1907) 2 K. B. 50; 76 L. J. K. B. 806, C. A., there are weighty dicta to the effect that where an agent

(*i*) See opposite page.

Provided always that—

- (a) where the goods are pledged, without authority, for an antecedent debt or liability of the pledgor, the pledgee acquires no further right to the goods than could have been enforced by the pledgor at the time of the pledge (*k*);
- (b) where the goods are pledged, without authority, in consideration of the delivery or transfer of other goods or documents of title to goods, or of a negotiable security, the pledgee acquires no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange (*l*).

For the purposes of this article,—

- (a) a pledge of the documents of title to goods is deemed to be a pledge of the goods (*m*);

obtains possession of goods by means of “larceny by a trick,” he cannot be said to be in possession with the consent of the owner. But *quære* whether it is not the circumstance that the owner does intend to part with the possession, though not with the ownership, that distinguishes larceny by a trick from other kinds of larceny.

(*i*) 52 & 53 Vict. c. 45, s. 2 (1) to (4); Illustrations 1 to 4. See *Cole v. North Western Bank*, 1875, L. R. 10 C. P. 354; 44 L. J. C. P. 233, as to the scope and intention of the Factors Acts. The Act of 1889, superseding and repealing all the previous Acts, is set out in full in the Appendix, *post*. As to notice, see Article 87.

(*k*) 52 & 53 Vict. c. 45, s. 4; Illustration 1.

(*l*) *Ibid.* s. 5.

(*m*) *Ibid.* s. 3; Illustration 1. The transfer of a document may be by indorsement, or, where the document is, by custom or by its

- (b) a person is not deemed to act in good faith and without notice if the circumstances of the particular case are such as would lead a reasonable business man to believe that the agent is exceeding his authority or acting in bad faith (*n*);
- (c) in the case of a disposition to two or more persons who are acting in the transaction as partners, want of good faith on the part of any one of them will deprive them all of the protection of the statute (*o*).

This article applies only to mercantile agents (*p*).

#### *Illustrations.*

1. A broker is authorized to sell goods, and is intrusted with the bill of lading for them by the owner thereof. By means of the bill of lading he obtains dock warrants for the goods, and without the authority of the principal, pledges the warrants with his banker as security for an overdraft, the banker taking them in good faith, and without notice that in so pledging them he is exceeding his authority. Before receiving notice of the want of authority, the banker, on the faith of the pledge, permits the overdraft to be increased. So

express terms, transferable by delivery, or makes the goods deliverable to the bearer, then by delivery: sect. 11.

(*n*) *Gobind Chunder Sein v. Ryan*, 1861, 9 Moo. Ind. App. 140, P. C.; *Navulshaw v. Brownrigg*, 1852, 2 De G. M. & G. 441; 21 L. J. Ch. 908; 95 R. R. 156; *Douglas v. Ewing*, 1857, 6 Ir. C. L. R. 395, Ir.; *Learoyd v. Robinson*, 1844, 13 L. J. Ex. 213; 12 M. & W. 745; 67 R. R. 470; *Mehta v. Sutton*, 1913, 109 L. T. 529, C. A.

(*o*) *Oppenheimer v. Frazer*, (1907) 2 K. B. 50; 76 L. J. K. B. 806, C. A.

(*p*) Illustrations 5 to 7. *Lewis v. Ramsdale*, 1886, 55 L. T. 179; *Inglis v. Robertson*, (1898) A. C. 616 67 L. J. P. C. 108, H. L. Sc.

far as concerns the overdraft existing at the time of the pledge, the principal is only bound by the pledge to the extent of any lien the broker had on the goods at that time, and may redeem the goods upon payment to that extent, and payment of the amount overdrawn since the date of the pledge. If the broker has a lien in excess of the full amount of the overdraft, the principal must, if required, also pay to the broker the amount of the excess before he is entitled to redeem the goods (*q*).

2. A factor is intrusted with the possession of goods for sale. The principal revokes his authority, and demands the return of the goods. The factor refuses to return the goods, and then fraudulently sells and delivers them to a person who purchases them in good faith, and without notice that the factor has not authority to sell them, or that he is in possession of the goods without the consent of the owner. The principal is bound by the sale, but may sue in his own name for the price, subject to any right of set-off the purchaser may have against the factor (*r*). The factor is civilly and criminally liable for the fraudulent breach of duty to the same extent as he would have been if the Factors Act had not been passed (*s*).

3. A factor in possession of goods with the consent of the owner, pledges them for an advance. Subsequently, the pledgee makes a further advance to the factor, in respect of the same goods. The principal is bound by both advances, provided that the pledgee acted in good faith, &c. (*t*). So, if the advances are made to a third person at the request of the factor (*u*).

4. A home agent employed by a foreign principal to

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(*q*) Sect. 12 (2).

(*r*) Sect. 12 (3). See *Moody v. Pall Mall, &c. Co.*, 1917, 33 T. L. R. 306.

(*s*) Sect. 12 (1).

(*t*) *Portalis v. Tetley*, 1867, L. R. 5 Eq. 140; 37 L. J. Ch. 139. But see *Waddington v. Neale*, 1907, 96 L. T. 786.

(*u*) *Sheppard v. Union Bank*, 1862, 7 H. & N. 661; 31 L. J. Ex. 154.

negotiate sales in London obtains an offer from A., which the principal accepts. The principal specially indorses to A. the bill of lading for the goods, and sends it to the agent to be exchanged for A.'s acceptance. The agent, without the principal's authority, agrees with A. to cancel the contract, and subsequently induces him to indorse the bill of lading by representing that it was specially indorsed by mistake, and then, having obtained possession of the goods by means of the bill of lading, pledges them for an advance. The pledge is not protected by the Factors Act, because the agent did not obtain possession of the goods by permission of the principal. The principal, therefore, is entitled to recover the goods from the pledgee (*x*).

5. An agent occupies a furnished house, and has the control of the furniture therein, with the consent of the owner of the furniture. A third person makes advances on the furniture, believing the agent to be the owner thereof. The transaction is not protected by the Factors Act (*y*).

6. A wine merchant's clerk, permitted to have the possession for the purpose of his master's business of dock warrants for wine belonging to his master, fraudulently pledges the warrants for an advance to himself. The transaction is not protected by the Factors Act, because the clerk is not a mercantile agent within the meaning of the Act (*z*).

7. A., a manufacturing jeweller, supplies jewellery to B., a retail jeweller, on sale or return, on the terms that it is to remain the property of A. until it is sold or paid for, B., after selling it, to retain half the difference between the cost price and selling price, by way of remuneration, and to remit the balance of the proceeds to A. B. is merely

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(*x*) *Vaughan v. Moffat*, 1868, 38 L. J. Ch. 144.

(*y*) *Wood v. Rowcliffe*, 1846, 6 Hare, 191; 77 R. R. 68.

(*z*) *Lamb v. Attenborough*, 1862, 31 L. J. Q. B. 41; 1 B. & S. 831. See also *Farquharson v. King*, (1902) A. C. 325; 71 L. J. K. B. 667, H. L.

A.'s agent for sale, and therefore a mercantile agent within the meaning of the Act (a).

*Note.*—It is not necessary that the pledge or other disposition should be in the ordinary course of business of the particular mercantile agent, and evidence of a custom of a particular trade excluding authority to pledge goods intrusted to a mercantile agent in that trade is not admissible for the purpose of limiting the protection given by the Act (b). A diamond broker may be acting in the ordinary course of business of a mercantile agent within the meaning of the Act, in pledging diamonds intrusted to him for sale, although by the custom of the trade such a broker has no authority to pledge diamonds so intrusted to him (b). And a pledge of diamonds or jewellery to a pawnbroker or money-lender is not necessarily outside the ordinary course of business because the loan may carry 20 or 30 per cent. interest (c). The charging of a high rate of interest is only material as evidence that the pledgee did not act in good faith, or that he had notice that the agent had no authority to make the pledge (d). It is not, however, in the ordinary course of business for an agent to ask a friend to pawn goods intrusted to him. In order that a pledge may be protected, the agent must pledge the goods himself (e).

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(a) *Weiner v. Harris*, (1910) 1 K. B. 285; 79 L. J. K. B. 342, C. A.

(b) *Oppenheimer v. Attenborough*, (1908) 1 K. B. 221; 77 L. J. K. B. 209, C. A.

(c) *Oppenheimer v. Attenborough*, *supra*; *Weiner v. Harris*, *supra* (overruling *Hastings v. Pearson*, (1893) 1 Q. B. 62; 62 L. J. Q. B. 75, where it was held that a pledge with a pawnbroker by an agent intrusted with jewellery for sale was not protected by the Act). It is not within the scope of this work to discuss the soundness of these decisions, both of which were unanimous, though they are obviously open to criticism.

(d) *Janesich v. Attenborough*, 1910, 102 L. T. 605.

(e) *De Gorter v. Attenborough*, 1905, 21 T. L. R. 19. See also *Biggs v. Evans*, (1894) 1 Q. B. 88, where it was held that a sale by a mercantile agent was not in the ordinary course of business because of the unusual mode of payment.

**Article 86.**LIEN ON CONSIGNEE FOR ADVANCES TO APPARENT  
OWNER OF GOODS.

Where the owner of goods has given possession thereof to an agent for the purpose of consignment or sale, or has shipped goods in the name of an agent, and the consignee of the goods has not had notice that the agent is not the owner thereof, the consignee in respect of advances made to or for the use of the agent, has the same lien on the goods as if the agent were the owner thereof, and may transfer any such lien to another person; provided that nothing in this article limits or affects the validity of any sale, pledge, or other disposition by a mercantile agent (*f*).

**Article 87.**NO UNAUTHORIZED ACT BINDING WITH RESPECT TO  
PERSONS WITH NOTICE.

No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that in doing the act the agent is exceeding his authority (*g*).

Where the regulations of a company are registered,

(*f*) Factors Act, 1889, s. 7 (1) and (2). See Article 85.

(*g*) See Illustrations. *Forman v. The Liddesdale*, (1900) A. C. 190; 69 L. J. P. C. 44; *Russo-Chinese Bank v. Li Yau Sam*, (1910) A. C. 174; 79 L. J. P. C. 60.



persons dealing with the directors and other agents of the company are for the purposes of this article deemed to have notice of such regulations (*h*).

A signature "per procuracy" on a bill of exchange, promissory note, or cheque, operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority (*i*).

#### *Illustrations.*

1. A broker in possession of goods upon which he has a lien for advances, pledges the goods for valuable consideration to a person who has notice that in so pledging them the broker is exceeding his authority. The transaction is not protected by the Factors Act, and the pledgee acquires no right to retain the goods as against the principal, even to the extent of the broker's lien, the lien not being transferable by such an unauthorized act (*k*).

2. A. authorized his son to take delivery of a mare, provided that a certain warranty was given, and told the owner so. The son took away the mare without the warranty in

(*h*) Illustration 9.

(*i*) 45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882), s. 25; *Alexander v. Mackenzie*, 1848, 18 L. J. C. P. 94; 6 C. B. 766; *Attwood v. Munnings*, 1827, 7 B. & C. 278; 31 R. R. 194; *Stagg v. Elliott*, 1862, 31 L. J. C. P. 260; 12 C. B. N. S. 373; *Reid v. Rigby*, (1894) 2 Q. B. 40; 63 L. J. Q. B. 451; *Gompertz v. Cooke*, 1904, 20 T. L. R. 106; *Morison v. Kemp*, 1912, 29 T. L. R. 70. Comp. *Bryant v. Quebec Bank*, (1893) A. C. 179; 62 L. J. P. C. 73, P. C.; *Smith v. M'Guire*, 1858, 3 H. & N. 554; 27 L. J. Ex. 465; 117 R. R. 853.

(*k*) *M'Combie v. Davies*, 1805, 7 East, 5; 8 R. R. 534; *Daubigny v. Duval*, 1794, 5 T. R. 604.

question. Held, that the son's act did not amount to an acceptance of the mare, so as to bind the father (*l*).

3. A. paid money to a broker for a specific purpose. B., knowing that the money belonged to A., obtained it from the broker under pretence of a loan for a few days, and then claimed it for a debt due to him from the broker. Held, that B. was liable to repay the amount to A. (*m*). So, the transferee of a bank note acquires no title thereto if he takes it with notice that the transfer is fraudulent (*n*).

4. An agent, purporting to act under a power of attorney, which he represented gave him full power to borrow, borrowed money from A., and misapplied it. The agent produced the power, which did not in fact authorize the loan, but A. acted on his representation, and did not read the power. Held, that A. must be taken to have had notice of the terms of the power, and that the principal was not bound by the loan (*o*).

5. A. accepts a bill of exchange drawn by B., and delivers it to B. to be held by him for A.'s use. B. indorses the bill to C. for a loan, having told C. that it belongs to A., and that he (B.) has no authority to deal with it. A. is entitled to recover the bill or its value from C. (*p*).

6. A. consigns goods to B., who agrees to deal with the proceeds in a particular manner. B. borrows money from C., a banker, and agrees that the proceeds of the goods shall be applied in repayment of the loan, C. having notice of the agreement between A. and B. The proceeds afterwards come to C.'s hands. C. must apply them according to the agree-

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(*l*) *Jordan v. Norton*, 1838, 4 M. & W. 155; 51 R. R. 508.

(*m*) *Litt v. Martindale*, 1856, 18 C. B. 314; 107 R. R. 311; *Muttyloll Seal v. Dent*, 1853, 8 Moo. P. C. 319; 97 R. R. 52.

(*n*) *Solomons v. Bank of England*, 1810, 13 East, 135; 12 R. R. 341.

(*o*) *Jacobs v. Morris*, (1902) 1 Ch. 816; 71 L. J. Ch. 363, C. A.

(*p*) *Evans v. Kymer*, 1830, 1 B. & Ad. 528; 35 R. R. 368.

ment between A. and B., and cannot retain them in repayment of the loan (*q*).

7. A. indorses a bill of exchange "pay B. or order for my use." B.'s bankers discount the bill and pay the proceeds to B.'s account. The bankers are liable to A. for the amount, because the restrictive indorsement operated as notice that the bill did not belong to B. (*r*). So, where A. gave bills to his agent indorsed "on account of A.," it was held that the agent could give no title to a pledgee, the indorsement operating as notice that he had no authority to pledge the bills (*s*).

8. The directors of a company instructed a broker to purchase, on behalf of the company, some of the company's own shares. The broker purchased and paid for the shares, and the company credited him with the amount. Held, that the transaction being *ultra vires* to the knowledge of the broker, the liquidator of the company was entitled to deduct the amount so credited from the debt for which the broker proved in the winding-up of the company (*t*).

9. The directors of a company enter into a contract which is beyond the scope of the authority given to them by the articles of association. The company is not bound by the contract (*u*). Otherwise if the contract had been within the scope of the authority of the directors, and they had merely omitted to observe the formalities required by the articles of association, the other contracting party not having notice of such omission (*x*).

(*q*) *Steele v. Stuart*, 1866, 14 L. T. 620; *Thayer v. Lister*, 1861, 30 L. J. Ch. 429. And see Article 110, Illustration 3.

(*r*) *Sigourney v. Lloyd*, *Lloyd v. Sigourney*, 1828, 5 Bing. 525. And see *Watkin v. Lamb*, 1901, 85 L. T. 483.

(*s*) *Treuttell v. Barandon*, 1817, 1 Moo. 543; 19 R. R. 472.

(*t*) *Zulueta's claim*, 1870, L. R. 5 Ch. 444; 39 L. J. Ch. 598.

(*u*) *Balfour v. Ernest*, 1859, 5 C. B. N. S. 601; 28 L. J. C. P. 170; 116 R. R. 788; *Re Arthur Average Ass.*, 1876, 34 L. T. 942.

(*x*) See Article 80, Illustrations 14 and 15, and cases there cited.

### Article 88.

#### HOLDING OUT ANOTHER AS AGENT.

Where any person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority which he was so represented to have (*y*).

Neither the committee of management nor servants of a club are, as such, deemed to be held out by the members of the club as having authority to pledge the personal credit of the members (*z*).

#### *Illustrations.*

1. The owner of certain goods permits A., who in the ordinary course of his business is accustomed to sell that class of goods, to have possession of the goods or of the documents of title thereto. A. sells the goods to a person who buys them in the belief that he has authority to sell. The owner

(*y*) See Illustrations. *Brazier v. Camp*, 1894, 63 L. J. Q. B. 257, C. A.; *King v. Smith*, (1900) 2 Ch. 425; 69 L. J. Ch. 598; *Union Credit Bank v. Mersey Docks, &c. Board*, (1899) 2 Q. B. 205; 68 L. J. Q. B. 842; *Little v. Spreadbury*, (1910) 2 K. B. 658; 79 L. J. K. B. 1119. This is an instance of the principle of estoppel *in pais*.

(*z*) *Fleming v. Hector*, 1836, 6 L. J. Ex. 43; 2 M. & W. 172; 46 R. R. 553; *Todd v. Emly*, 1841, 7 M. & W. 427; 56 R. R. 748. Illustration 15. *Comp. Cockerell v. Aucompte*, 1857, 26 L. J. C. P. 194; 2 C. B. N. S. 440; 109 R. R. 748; *Luckombe v. Ashton*, 1862, 2 F. & F. 705.

is bound by the sale, independently of the Factors Acts, though he did not, in fact, authorize A. to sell the goods (a).

2. A. and B. permitted their names to appear on a programme as stewards of a fête, C.'s name appearing thereon as general manager. A. and B. took an active part in the conduct of the fête. Held, that they were liable on orders given by C. for tents, &c. (b).

3. At a meeting of the provisional directors of a proposed company it was resolved that the company should be advertised, and the secretary was directed to take the necessary steps for that purpose. The secretary employed an advertising agent, and upon being asked on what authority he was acting, showed the agent the prospectus and resolution. Held, that the jury were justified in finding the directors who were parties to the resolution liable for the expenses of the advertising agent, on the ground that they had held out the secretary as having authority to pledge their credit therefor, though they had allowed their names to appear as provisional directors on the faith of a promise by the secretary to find all the preliminary expenses (c). Where a promoter of a company has taken an active part in the promotion thereof, it is a question of fact whether he thereby held himself out as having authorized his credit to be pledged for expenses connected therewith, and if so, whether the expenses were incurred on the faith of such holding out (d). But the

(a) *Pickering v. Busk*, 1812, 15 East, 38; 13 R. R. 364; *Dyer v. Pearson*, 1824, 4 D. & R. 648; 27 R. R. 286; *Henderson v. Williams*, (1895) 1 Q. B. 521; 64 L. J. Q. B. 308, C. A.

(b) *Pilot v. Craze*, 1888, 52 J. P. 311.

(c) *Maddick v. Marshall*, 1864, 17 C. B. N. S. 829, Ex. Ch.; *Riley v. Packington*, 1867, L. R. 2 C. P. 536; 36 L. J. C. P. 204; *Pearson's Exors.' case*, 1852, 3 De G. M. & G. 241.

(d) *Lake v. Argyll*, 1844, 6 Q. B. 477; 14 L. J. Q. B. 73; *Wood v. Argyll*, 1844, 13 L. J. C. P. 96; 6 M. & G. 928; *Bailey v. Macauley*, 1849, 13 Q. B. 815; 19 L. J. Q. B. 73; 78 R. R. 524; *Williams v. Pigott*, 1848, 2 Ex. 201; 17 L. J. Ex. 196; *Bright v. Hutton*, 1852, 3 H. L. Cas. 341; 88 R. R. 126; *Higgins v. Hopkins*, 1848, 3 Ex. 163; 18 L. J. Ex. 113; 77 R. R. 575.

mere fact that a person is a promoter is not, of itself, evidence for the jury of his having authorized, or held himself out as having authorized, his credit to be pledged (*e*):

4. A ship is chartered, and it is agreed by the charter-party that the master, who is appointed by the owners, shall sign bills of lading as the agent of the charterers **only**. The owners are liable on a bill of lading signed by the master, to a person who ships goods without notice of the charter-party (*f*). So, the owners are liable in such a case for necessaries supplied on the master's orders by persons having no notice of the charter-party (*g*).

5. A. had for some years managed a shop belonging to B. and ordered goods in B.'s name from C., and B. had duly paid for them. A. absconded, called on C. and bought goods in B.'s name, and took them away. Held, that B. was liable for the price of the goods (*h*).

6. A coachman in livery entered into a contract for the hire of horses, the person from whom he hired them giving credit to the master. The coachman had, in fact, agreed with the master to pay for the hire of the horses, but the person from whom they were hired had no notice of the agreement. Held, that the master was liable on the contract (*i*).

(*e*) *Norris v. Cottle*, 1850, 2 H. L. Cas. 647; *Bright v. Hutton*, *supra*; *Hutton v. Thompson*, 1851, 3 H. L. Cas. 161; *Burbidge v. Morris*, 1865, 34 L. J. Ex. 131; 3 H. & C. 664; *Wylde v. Hopkins*, 1846, 15 M. & W. 517; 71 R. R. 751; *Barker v. Stead*, 1847, 3 C. B. 946; *Bailey v. Macauley*, *supra*; *Williams v. Pigott*, *supra*.

(*f*) *Manchester Trust v. Furness*, (1895) 2 Q. B. 539; 64 L. J. Q. B. 766, C. A.; *Sandeman v. Scurr*, 1866, L. R. 2 Q. B. 86; 36 L. J. Q. B. 58. Comp. *Baumwoll Manufactur v. Furness*, (1893) A. C. 8; 62 L. J. Q. B. 201, H. L.

(*g*) *The Great Eastern*, 1868, L. R. 2 Ad. 88; *Frost v. Oliver*, 1853, 1 C. L. R. 1003; 22 L. J. Q. B. 353.

(*h*) *Summers v. Solomon*, 1857, 26 L. J. Q. B. 301.

(*i*) *Rimell v. Sampayo*, 1824, 1 C. & P. 254; *Precious v. Abel*, 1795,

7. A wife gave orders for furniture to be supplied and work to be done at the house where she resided with her husband, the husband being present giving directions as to the work, &c. Held, that the husband was liable on the orders, although he had expressly forbidden his wife to pledge his credit, and it had been agreed between them that she should pay for the furniture and work, the plaintiff having had no notice of such prohibition or agreement (*k*).

8. A. occasionally employed B. to purchase goods from C., and duly recognized such purchases. Subsequently, B. purchased goods from C. for his own use, C. believing him to be buying them on behalf of A., and giving credit to A. Held, that it was a question for the jury whether A. had, by his conduct, held out B. as his agent to purchase the goods, and that if he had done so, he was liable to C. for the price (*l*). So, where a wife ordered goods in her husband's name, to be sent to the house of a third person, and the husband paid for the goods, that was held to be sufficient evidence to justify a jury in finding that she had authority to pledge his credit on a subsequent occasion for goods to be sent to the same house (*m*).

9. A., a stockbroker, employed B., a clerk, to whom he allowed a commission on orders obtained by him and accepted by A. B. was not authorized to accept orders on A.'s behalf. On three occasions C. gave orders to B., which were passed on to A., and executed by him, A. sending contract notes to C. C. made payment in respect of the first two orders by

1 Esp. 350. Comp. *Maunder v. Conyers*, 1817, 2 Stark. 281; *Wright v. Glyn*, (1902) 1 K. B. 745; 71 L. J. K. B. 497, C. A.

(*k*) *Jetley v. Hill*, 1884, 1 C. & E. 239.

(*l*) *Todd v. Robinson*, 1825, 1 Ry. & M. 217; *Gilman v. Robinson*, 1825, 1 Ry. & M. 226; 28 R. R. 795; *Trueman v. Loder*, 1840, 11 A. & E. 589; 52 R. R. 451; *Llewellyn v. Winckworth*, 1845, 14 L. J. Ex. 329; 13 M. & W. 598; 67 R. R. 751; *Prescott v. Flynn*, 1832, 1 L. J. C. P. 145; 9 Bing. 19; 35 R. R. 508. Comp. *Barrett v. Irvine*, (1907) 2 Ir. R. 462, C. A.

(*m*) *Filmer v. Lynn*, 1835, 4 N. & M. 559.

cheques payable to A.'s order, and in respect of the third order by a cheque payable to B.'s order. The cheques were delivered to B., and passed on to A., who duly credited C. Subsequently, C. gave orders to B., who did not transmit them to A., but made out bought notes on which he forged A.'s signature, and handed them to C. C. gave cheques in payment to B., who misapplied them. It was held that there was no evidence to go to the jury of A.'s having held out B. as authorized to accept orders on his behalf, and that A. was under no liability in respect of the orders subsequent to the first three (*n*).

10. A. represented to a company that B. was an applicant for a certain number of shares, and the company allotted them to B. Subsequently, B., at A.'s request, signed an application for the shares and sent it to A., who received the letter of allotment, and paid the allotment money. B. never received any notice of the allotment, and the dividends on the shares were paid to A. Held, that B. had held out A. as his agent to accept the shares on his behalf, and was therefore liable as a contributory in the winding-up of the company (*o*).

11. A. signs an underwriting agreement purporting to give B. authority to apply for shares in a company in A.'s name and on his behalf, and hands it to an agent of the promoters, with a letter stating that the agreement was signed, and is only to hold good, on certain conditions. The agreement is delivered to B., who applies for the shares, and they are duly allotted to A., neither B. nor the company having any notice of the letter or conditions. A. is bound as a shareholder, though the conditions were not complied with (*p*).

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(*n*) *Spooner v. Browning*, (1898) 1 Q. B. 528; 67 L. J. Q. B. 339, C. A.

(*o*) *Levita's case*, 1870, L. R. 5 Ch. 489; 39 L. J. Ch. 673.

(*p*) *Ex p. Harrison, Re Bentley*, 1893, 69 L. T. 204, C. A.



12. A. was in B.'s counting-house, apparently conducting B.'s business. Held, that a payment to A. on B.'s account operated as a payment to B., although A. was not, in fact, employed by B. (*q*).

13. A., in good faith, deals with persons acting as directors of a company, believing them to be duly authorized. The company is bound by their acts as directors, within the scope of the articles of association, though they have not, in fact, been properly appointed (*r*).

14. The directors of a company hold out to the world that A. is the agent of the company for a particular purpose. The company is bound by A.'s acts, within the scope of such countenanced agency, done to the knowledge of the directors, though A. is not a duly appointed agent of the company (*s*).

15. A member of the managing committee of a club orders wine for the club, the committee having no authority to deal on credit. The other members of the committee are not liable for the price of the wine, unless they authorized the contract (*t*). The only persons liable for goods supplied to a members' club are those by whom, or by whose authority, the goods are ordered, and the mere fact that a person is a member of the managing committee is not of itself evidence of authority to pledge his credit (*u*).

(*q*) *Barrett v. Deere*, 1828, Moo. & M. 200; 31 R. R. 730.

(*r*) *Mahony v. East Holyford Mining Co.*, 1875, L. R. 7 H. L. 869; *Re County Life Ass. Co.*, 1870, L. R. 5 Ch. 288; 39 L. J. Ch. 471.

(*s*) *Wilson v. West Hartlepool Harbour, &c. Co.*, 1864, 34 Beav. 187. See also Article 80, Illustrations 14 and 15.

(*t*) *Todd v. Emly*, 1841, 7 M. & W. 427; 56 R. R. 748.

(*u*) *Overton v. Hewett*, 1887, 3 T. L. R. 246; *Steele v. Gourley*, 1887, 3 T. L. R. 772, C. A.; *Wood v. Finch*, 1861, 2 F. & F. 447; *Draper v. Manvers*, 1892, 9 T. L. R. 73.

Sect. 2.—*Rights and liabilities of the principal on contracts made by agent.*

Article 89.

CROWN MAY SUE OR BE SUED ON CONTRACTS MADE BY  
PUBLIC AGENT.

The Crown may sue, or may be sued by petition of right, on any contract duly made on its behalf by a public agent (*x*).

Article 90.

PRINCIPAL MAY SUE OR BE SUED IN HIS OWN NAME.

Every principal, whether disclosed or undisclosed, may sue or be sued in his own name on any contract duly made on his behalf (*y*), and in respect of any money paid or received by his agent on his behalf (*z*). Provided always that the right of the principal to sue, and his liability to be sued, on a contract made by his agent, may be excluded by the terms of the contract (*a*).

Where an agent enters into a contract, verbal or written, in his own name, parol evidence is

(*x*) *Thomas v. Reg.*, 1874, L. R. 10 Q. B. 31; 44 L. J. Q. B. 9.

(*y*) Illustrations 1 to 5. *Browning v. Provincial Ins. Co.*, 1873, L. R. 5 P. C. 263, P. C.; *Bell v. Plumbly*, 1900, 16 T. L. R. 393. Article 95. Illustrations 5 to 7.

(*z*) Illustrations 6 to 8. *Evans v. Collins*, 1844, 5 Q. B. 804; 64 R. R. 647.

(*a*) Illustration 10. *M'Auliffe v. Bicknell*, 1835, 2 C. M. & R. 263.

admissible to show who is the real principal, in order to charge him or entitle him to sue on the contract (*b*), provided that such evidence is not inconsistent with the terms of a written contract (*c*).

The right and liability of a principal, whether disclosed or undisclosed, to sue and be sued in his own name on a contract made on his behalf, are not affected by the circumstance that the contract is to be partly performed by the agent, and from the terms thereof, the consideration appears to move from the agent alone (*d*); nor by the circumstance that the agent was acting as a *del credere* agent (*e*).

This article, so far as concerns undisclosed principals, does not apply to foreign principals, nor to deeds, bills of exchange, promissory notes, or cheques (*f*).

#### *Illustrations.*

1. A factor sells goods in his own name. The principal may intervene and sue for the price (*g*).

2. A wife, who carried on a business on behalf of her husband upon premises of which she was tenant and in respect

(*b*) Illustration 11. *Morris v. Wilson*, 1859, 5 Jur. N. S. 168; *Calder v. Dobell*, 1871, L. R. 6 C. P. 486; 40 L. J. C. P. 224; *Wilson v. Hart*, 1817, 1 Moore, 45; *Weidner v. Hoggett*, 1876, 1 C. P. D. 533; *Trueman v. Loder*, 1840, 11 A. & E. 589; 52 R. R. 451.

(*c*) Illustration 12.

(*d*) *Phelps v. Prothero*, 1855, 24 L. J. C. P. 225; 16 C. B. 370; 100 R. R. 763.

(*e*) *Hornby v. Lacy*, 1817, 6 M. & S. 166; 18 R. R. 345.

(*f*) See Articles 91 to 93.

(*g*) *Sadler v. Leigh*, 1815, 4 Camp. 195.

of which she paid the rates, ordered goods for the business in her own name. Held, that the husband was liable for the price of the goods (*h*).

3. S., a solicitor, practised in the name of S. and C. C. was also a solicitor, but acted as clerk to S. Held, that S., being the real principal, was entitled to sue alone upon a contract made in the name of the firm (*i*).

4. A part-owner of a whaling vessel sold whale oil in his own name. Held, that the owners were entitled to sue jointly for the price, though the purchaser did not know that any person besides the seller was interested (*k*). So, if three persons agree that one of them shall purchase goods in his own name in their joint behalf, they may jointly sue the vendor for breach of a contract made in pursuance of such agreement (*l*).

5. The law clerk of the trustees of a public road retains a parliamentary agent on behalf of the trustees. The trustees are directly liable to the agent for his costs, in the absence of an agreement to the contrary (*m*).

6. An agent entered into a contract in his own name for the purchase of property, and paid a deposit. Held, that on the default of the vendor, the principal was entitled to sue in his own name for the return of the deposit (*n*).

7. A custom-house officer took exorbitant fees from a shipmaster. Held, that the owner of the vessel had a right to sue in his own name to recover the amount paid in excess of the proper fees (*o*).

(*h*) *Petty v. Anderson*, 1825, 3 Bing. 170. Comp. *Smallpiece v. Dawes*, 1835, 7 C. & P. 40.

(*i*) *Spurr v. Cass, Cass v. Spurr*, 1870, L. R. 5 Q. B. 656; 39 L. J. Q. B. 249; *Kell v. Nainby*, 1829, 10 B. & C. 20.

(*k*) *Skinner v. Stocks*, 1821, 4 B. & Ald. 437; 23 R. R. 337.

(*l*) *Cothay v. Fennell*, 1830, 10 B. & C. 671; 34 R. R. 541.†

(*m*) *Ridgway v. Lees*, 1856. 25 L. J. Ch. 584.

(*n*) *Norfolk v. Worthy*, 1808, 1 Camp. 337; 10 R. R. 749.

(*o*) *Stevenson v. Mortimer*, 1778, Cowp. 805.

8. An agent appointed by the managing owner of a ship demanded too much freight from the consignees of certain goods, and refused to deliver the goods until payment. The consignees paid the amount demanded, under protest, and sued one of the part-owners of the ship for the excess. Held, that the defendant was liable, though no portion of the money had come to his hands (*p*).

9. An auctioneer receives a deposit at a sale by auction. Though it is his duty to hold the deposit as a stakeholder, he is so far the agent of the vendor in receiving it, that the vendor is responsible to the purchaser in the event of a loss through the insolvency of the auctioneer (*q*).

10. A. is the managing part-owner of a ship. He becomes a member of a mutual insurance association, and insures the ship under the rules and regulations of that association. By the terms of the policy and rules of the association, the right to recover in respect of losses, and the liability for contributions in the nature of premiums, is confined to members of the association. The other part-owners, not being members of the association, cannot as undisclosed principals of A. sue for any losses, nor can they be sued for contributions due in respect of the policy, even if A. fails to pay them, because the right and liability of the principals to sue and be sued are excluded by the terms of the contract (*r*). Otherwise, if the liability for contributions is thrown by the policy on the persons assured, without reference to whether they are members of the association or not; or if it is provided that the persons assured shall be liable therefor as if they were members (*s*).

11. A. signs and addresses a letter to B., undertaking to

(*p*) *Coulthurst v. Sweet*, 1866, L. R. 1 C. P. 649.

(*q*) *Rowe v. May*, 1854, 18 Beav. 613; 104 R. R. 547; *Annesley v. Muggridge*, 1816, 1 Madd. 596; 16 R. R. 273; *Smith v. Jackson*, 1816, 1 Madd. 620; 16 R. R. 279.

(*r*) *United Kingdom, &c. Ass. v. Nevill*, 1887, 19 Q. B. D. 110; 56 L. J. Q. B. 522, C. A.; *Montgomerie v. U. K., &c. Ass.*, (1891) 1 Q. B. 370; 60 L. J. Q. B. 429.

(*s*) *Ocean, &c. Ins. Ass. v. Leslie*, 1889, 22 Q. B. D. 722; *Great*

answer for a certain debt due from C., D. being in fact the creditor. Parol evidence is admissible to prove that the letter was addressed to B. as D.'s agent, so as to entitle D. to sue A. on the guarantee, though D. is not named in the letter, and it was addressed to B. as if B. were the creditor (*t*).

12. An agent executed a charter-party in his own name, and was described in the contract as the owner of the vessel. It was held that the principal was not entitled to give evidence to show that the agent contracted on his behalf, so as to enable him to maintain an action on the contract, because such evidence was inconsistent with the statement that the agent was the owner of the vessel (*u*).

### Article 91.

#### FOREIGN PRINCIPALS.

No foreign principal may sue or be sued on any contract made by a home agent, unless the agent had authority to establish privity of contract between the principal and the other contracting party, and it clearly appears from the terms of the contract, or from the surrounding circumstances, that it was the intention of the agent and of the other contracting party to establish such privity of contract (*x*).

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*Britain, &c. Ass. v. Wylie*, 1889, 22 Q. B. D. 710; 58 L. J. Q. B. 614, C. A.; *British Marine, &c. Assn. v. Jenkins*, (1900) 1 Q. B. 299; 69 L. J. Q. B. 177.

(*t*) *Bateman v. Phillips*, 1812, 15 East, 272; 38 R. R. 554.

(*u*) *Humble v. Hunter*, 1848, 12 Q. B. 310; 17 L. J. Q. B. 350; 76 R. R. 291. Cf. *Rederi A/B Transatlantic v. Drughorn*, (1918) 1 K. B. 394; 87 L. J. K. B. 585, C. A.; *Rederi v. A/B Argonaut v. Hani*, (1918) 2 K. B. 247; 87 L. J. K. B. 901; *Formby v. Formby*, 1910, 102 L. T. 116, C. A.

(*x*) *Malcolm v. Hoyle*, 1893, 63 L. J. Q. B. 1, C. A.; *Die Elbinger v.*

In the absence of evidence to the contrary, it is presumed that a home agent has not authority to establish privity of contract between his foreign principal and third persons (*y*).

### Article 92.

#### DEEDS.

No principal may sue or be sued on any deed, even if it is expressed to be executed on his behalf, unless he is described as a party thereto and it is executed in his name (*z*).

This article is subject to the 46th section of the Conveyancing and Law of Property Act, 1881 (*a*), which provides that every assurance, instrument and thing executed and done by the donee of a power of attorney in and with his own name and signature and his own seal, by the authority of the donor of the power, shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor.

*Claye*, 1873, L. R. 8 Q. B. 313; 42 L. J. Q. B. 151; *Hutton v. Bulloch*, 1874, L. R. 9 Q. B. 572; *Dramburg v. Pollitzer*, 1873, 28 L. T. 470; *Smyth v. Anderson*, 1849, 18 L. J. C. P. 109; 7 C. B. 21; *Paterson v. Gandasequi*, 1812, 15 East, 62; 13 R. R. 368.

(*y*) See note (*x*), *supra*.

(*z*) *Chesterfield Colliery Co. v. Hawkins*, 1865, 3 H. & C. 677: Illustrations 1 to 4.

(*a*) 44 & 45 Vict. c. 41.

*Illustrations.*

1. An agent entered into a contract by deed in his own name, the principal not being named therein. It was held that the principal was not liable to be sued on the contract (*b*).

2. A shipmaster executed a charter-party by deed in his own name "as agent for the owners." Held, that the owners were not entitled to sue for the freight, because they were not parties to the deed (*c*).

3. An attorney, who was authorized in writing to execute a lease, signed and sealed the lease in and with his own name and seal. It was held that the principal was not entitled to sue on the covenants in the lease, though they were expressed to be made by the tenant with the landlord, because the deed was not executed in his name (*d*).

4. A. by deed transfers shares to B. In consequence of the winding-up of the company, the transfer cannot be registered, and A. is compelled to pay a "call." A. has no right of action for indemnity against B.'s principal, for whom B. acted in taking the transfer (*e*).

The Conveyancing Act, 1881, applies only to instruments executed in pursuance of a power of attorney, and, apparently, only where the donor of the power expressly gives the donee authority to act in his own name. How far the Act affects the principle that no person can sue or be sued on a deed except the parties thereto has not yet been judicially determined.

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(*b*) *Pickering's claim*, 1871, L. R. 6 Ch. 525.

(*c*) *Schack v. Anthony*, 1813, 1 M. & S. 573.

(*d*) *Berkeley v. Hardy*, 1826, 8 D. & R. 102; 29 R. R. 261; *Southampton v. Brown*, 1827, 6 B. & C. 718; 30 R. R. 511. And see *Chapman v. Smith*, (1907) 2 Ch. 97; 76 L. J. Ch. 394.

(*e*) *Torrington v. Lowe*, 1868, L. R. 4 O. P. 26; 38 L. J. C. P. 121.



## Article 93.

## BILLS, NOTES AND CHEQUES.

The only persons liable on a bill of exchange, promissory note, or cheque, are those whose signatures appear thereon (*f*), and in determining whether a signature is that of the principal, or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument is adopted (*g*). And no person can be liable as acceptor of a bill of exchange except the person on whom it is drawn, unless it be accepted for honour (*h*). Hence—

- (a) where a bill of exchange is drawn on the principal, the principal is deemed to be the acceptor, whether the acceptance is in his name or in that of the agent (*i*);
- (b) where a bill of exchange is drawn on an agent, the principal is not liable as acceptor, even if it is accepted in his name and with his authority (*k*);
- (c) where a signature is placed on a bill of exchange, promissory note, or cheque, other-

(*f*) 45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882), s. 23; *Ex p. Rayner, Re Waud*, 1868, 17 W. R. 64.

(*g*) *Ibid.* s. 26 (2).

(*h*) *Polhill v. Walter*, 1832, 1 L. J. K. B. 92; 3 B. & Ad. 114; 37 R. R. 344; *Davis v. Clarke*, 1844, 6 Q. B. 16; 13 L. J. Q. B. 305; 66 R. R. 255.

(*i*) Illustrations 1 to 3.

(*k*) Illustration 4.

wise than as that of the acceptor of a bill of exchange, the principal is liable only if his name is signed, or the signature is expressed to be made on his behalf (*l*).

### *Illustrations.*

1. A bill of exchange was addressed to "William Bradwell." His wife wrote across it "Mary Bradwell." On the bill being presented to William Bradwell, he said that he knew all about it and would pay it shortly. Held, that he was liable as acceptor, his promise to pay being sufficient evidence of authority or ratification (*m*).

2. A bill of exchange was addressed to "E. M. and others, trustees of Clarence Temperance Hall," and was accepted by E. M. in his own name. The jury found that E. M. had authority to accept on behalf of all the trustees. Held, that they were all liable as acceptors (*n*).

3. A bill of exchange was addressed to a company, and was accepted by authorized directors in their own names. Held, that the company was liable as acceptor (*o*).

4. A bill of exchange is addressed to A. B., and is accepted "A. B. for and on behalf of C. D." C. D. is not liable as acceptor, even if A. B. was expressly authorized to accept the bill on his behalf (*p*).

5. A duly authorized agent draws or indorses a bill, or indorses a note or cheque, in his own name. The principal is not liable on the bill, note or cheque (*q*). (A firm is not

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(*l*) Illustrations 5 to 7. *Serrell v. Derbyshire Rail. Co.*, 1850, 19 L. J. C. P. 371; 9 C. B. 811; 82 R. R. 532.

(*m*) *Lindus v. Bradwell*, 1848, 17 L. J. C. P. 121; 5 C. B. 583; 78 R. R. 798.

(*n*) *Jenkins v. Morris*, 1847, 16 M. & W. 877.

(*o*) *Okell v. Charles*, 1876, 34 L. T. 822, C. A.

(*p*) *Polhill v. Walter*, 1832, 3 B. & Ad. 114; 37 R. R. 344.

(*q*) *Ducarrey v. Gill*, 1830, M. & M. 450.

liable unless either the firm name appears, or the names of all the partners appear (*r*.)

6. By a deed of composition, the business of a debtor was assigned to trustees, in trust to continue the business in the name of the debtor. The debtor, being employed by the trustees to carry on the business, in the ordinary course indorsed bills of exchange in his own name. Held, that the trustees were liable as indorsers, the bills being indorsed in the name in which the business was carried on (*s*).

7. A joint stock company was held liable on a promissory note, sealed with the common seal, in the following form:—  
“We, two directors of P. Society, by and on behalf of the said society, do hereby promise, &c. (Signed) A. B., C. D., directors” (*t*).

#### Article 94.

##### BROKERS' BOUGHT AND SOLD NOTES.

Where a broker contracts on behalf of both buyer and seller, an entry of the transaction in his book, signed by him, operates as a memorandum of the contract signed by both parties, for the purpose of satisfying the provisions of the 4th section of the Sale of Goods Act, 1893 (*u*); and a mistake in the bought and sold notes does not affect the

(*r*) *Re Adanson Fibre Co., Miles' claim*, 1874, L. R. 9 Ch. 635; 43 L. J. Ch. 732; *Ex p. Buckley*, 1845, 14 L. J. Ex. 341; 14 M. & W. 469; 69 E. R. 735; *Carolina Bank v. Case*, 1828, 8 B. & C. 427.

(*s*) *Furze v. Sharwood*, 1841, 2 Q. B. 388.

(*t*) *Aggs v. Nicholson*, 1856, 1 H. & N. 165; 108 R. R. 503.

(*u*) *Heyman v. Neale*, 1809, 2 Camp. 337; *Thompson v. Gardiner*, 1876, 1 C. P. D. 777; *Sivewright v. Archibald*, 1851, 20 L. J. Q. B. 529.

validity of such a contract ( $x$ ). Where there is no such signed entry, signed bought and sold notes form a binding contract in writing if they substantially agree ( $x$ ); but not if there is a material variance between them ( $y$ ).

Where a broker acts on behalf of only one of the parties to a contract, and sends a note thereof to the other party, such note forms the contract, and its validity is not affected by the circumstance that there is a variance in a note sent by him to his own principal ( $z$ ).

#### Article 95.

##### EFFECT OF PARTICULAR CUSTOMS OR USAGES.

Where an agent contracts in a particular market, the contract is deemed to be made subject to the rules and regulations, and to the customs and usages of that market ( $a$ ), so far as they are not inconsistent with the express terms of the con-

( $x$ ) *Sivewright v. Archibald*, *supra*; *Kempson v. Boyle*, 1865, 34 L. J. Ex. 191; 3 H. & C. 763; *Goom v. Afalo*, 1826, 6 B. & C. 117; 30 R. R. 262; *Townend v. Drakeford*, 1843, 1 C. & K. 20; 70 R. R. 764.

( $y$ ) *Grant v. Fletcher*, 1826, 5 B. & C. 436; 29 R. R. 286; *Gregson v. Ruck*, 1843, 4 Q. B. 737; 62 R. R. 475; *Cowie v. Remfrey*, 1846, 5 Moo. P. C. 232; 70 R. R. 47.

( $z$ ) *McCaul v. Strauss*, 1883, 1 C. & E. 106.

( $a$ ) *Hodgkinson v. Kelly*, 1868, L. R. 6 Eq. 496; 37 L. J. Ch. 837; *Stray v. Russell*, 1860, 28 L. J. Q. B. 279; 29 L. J. Q. B. 115; 117 R. R. 506, Ex. Ch.; *Graves v. Legg*, 1857, 26 L. J. Ex. 316; 2 H. & N. 210; 115 R. R. 497; *Case v. McClellan*, 1872, 25 L. T. 753; *Kirchner v. Venus*, 1859, 12 Moo. P. C. 361, P. C., and see Illustrations.

tract (b). Provided, that the principal is not bound by any unreasonable rule, regulation, custom or usage, unless he had notice thereof, and agreed to be bound thereby, at the time when he authorized the agent to make the contract (c). Provided also that the right of the principal, whether disclosed or undisclosed, to sue in his own name, and his liability to be sued, on a contract made on his behalf, are not affected by the circumstance that it was made in a market, by the rules or regulations, customs or usages of which the agent is personally liable on the contract, and the contract is there regarded as that of the agent alone, whether such rules, regulations, customs or usages were known to the principal at the time when he authorized the agent to make the contract or not (d).

#### *Illustrations.*

1. A. authorizes a member of the Stock Exchange to purchase shares on his behalf. A. must indemnify the seller against any liability for calls on the shares subsequent to the contract of sale, though the transfer of the shares, by reason of the winding-up of the company, cannot be registered (e). A contract made on the Stock Exchange for the sale of shares does not import any undertaking by the seller that the company will register the transferee as a shareholder (f).

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(b) *The Alhambra*, 1881, 6 P. D. 68; 50 L. J. C. P. 36, C. A.; *Hayton v. Irwin*, 1879, 5 C. P. D. 130, C. A. Illustration 2.

(c) *Sweeting v. Pearce*, 1859, 7 C. B. N. S. 449; 29 L. J. C. P. 265; *Pearson v. Scott*, 1878, 9 Ch. D. 198; 47 L. J. Ch. 705.

(d) Illustrations 5 to 7.

(e) See note (a), *supra*.

(f) *London Founders Ass. v. Clarke*, 1888, 20 Q. B. D. 576; 57 L. J. Q. B. 291, C. A.; *Casey v. Bentley*, (1902) 1 Ir. R. 376, C. A.

2. A. employs B., a broker, to sell shares on the Stock Exchange. B. sells the shares to C., a jobber, who also is a member of the Stock Exchange. C. gives the name of D. as purchaser, to whom A. executes a transfer, and who duly pays for the shares. D. does not execute the transfer nor register himself as a shareholder, in consequence of which A. is compelled to pay a call in the winding-up of the company. By the usage of the Stock Exchange, a jobber who contracts to purchase shares is bound either to purchase them himself, or to substitute the name of another person who is competent and willing to purchase them; and if such name is not objected to within a certain time limited for that purpose, the jobber is discharged from all liability on the contract. Such usage is reasonable, and C. is not liable to indemnify A. in respect of the call, though D. may be insolvent (*g*). But the jobber is not discharged, unless he gives the name of a person who is competent to contract, and who can be legally compelled to accept a transfer of the shares. If he gives the name of an infant, or of a person who has not authorized his name to be given as a purchaser, he continues to be personally liable on the contract, and must indemnify the seller against liability for calls (*h*). Where a jobber purchases shares "with registration guaranteed," he is bound to register them in his own name in default of registration by the person whose name he gives as a purchaser, because the usage discharging him from liability is inconsistent with the express terms of the contract (*i*).

3. A., through his broker, sells on the Stock Exchange 100 shares to a jobber, who duly gives the names of B., C., D., and E. as purchasers of 25 shares each. The names are

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(*g*) *Grissell v. Bristowe*, 1869, L. R. 4 C. P. 36; 38 L. J. C. P. 10, Ex. Ch.; *Marted v. Paine*, 1869, L. R. 4 Ex. 203; 38 L. J. Ex. 129.

(*h*) *Nichalls v. Merry*, 1875, L. R. 7 H. L. 530; 45 L. J. Ch. 575, H. L.; *Marted v. Paine*, 1869, L. R. 4 Ex. 81; 38 L. J. Ex. 129. See also *Queensland Investment Co. v. O'Connell*, 1896, 12 T. L. R. 502.

(*i*) *Cruse v. Paine*, 1869, L. R. 4 Ch. 441; 38 L. J. Ch. 225.

accepted by A., who executes transfers accordingly, and the jobber pays him the price of the shares. In consequence of the winding-up of the company, the transfers cannot be registered. The jobber is discharged from liability to A., and A. is entitled to specific performance and indemnity against B., C., D., and E. respectively, their brokers having duly accepted the transfers and certificates of the shares on their behalf (*k*).

4. A. authorizes B., a broker and member of the Stock Exchange, to purchase 100 shares in a certain company. B. purchases the shares from a jobber, and passes a ticket with the name of A. as a purchaser. The ticket is split, according to usage, and a part thereof for 15 shares is handed to C.'s brokers, who had contracted to sell that number to the jobber. C. executes a transfer of 15 shares to A., and the transfer and certificates are accepted by B. on A.'s behalf. A. refuses to accept the shares, and the company being wound up, C. is compelled to pay calls. A. must indemnify C. in respect of the calls (*l*).

5. A broker contracts on the Stock Exchange for an undisclosed principal. The principal may sue in his own name on the contract, even if he was aware, at the time when he employed the broker, that by the rules of the Exchange the broker is personally liable, and is regarded as the contracting party (*m*).

6. A., a broker, buys shares on the Stock Exchange in his own name, the principal being undisclosed. A. becomes a defaulter, and his transactions are closed by the Official

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(*k*) *Coles v. Bristowe*, 1868, L. R. 4 Ch. 3; 38 L. J. Ch. 81; *Hawkins v. Maltby*, 1869, L. R. 4 Ch. 200; 38 L. J. Ch. 313; *Shepherd v. Gillespie*, 1869, 38 L. J. Ch. 67.

(*l*) *Bowring v. Shepherd*, 1871, L. R. 6 Q. B. 309, Ex. Ch.; *Brown v. Black*, 1873, L. R. 8 Ch. 939; 42 L. J. Ch. 814.

(*m*) *Langton v. Waite*, 1868, L. R. 6 Eq. 165; 37 L. J. Ch. 345; *Humphrey v. Lucas*, 1845, 2 C. & K. 152; 80 R. R. 833; *Lisset v. Reave*, 1742, 2 Atk. 394; *Currie v. Booth*, 1902, 7 Com. Cas. 77, C. A.

**Assignee.** The jobber from whom A. bought the shares tenders them to the principal and calls upon him to complete the contract. The principal is bound to complete, and if he refuses to do so, the jobber is entitled to sell the shares on the market in the ordinary way and recover any differences from the principal (*n*). The rules of the Stock Exchange as to buying in and selling out do not apply to such cases, but only as between members of the Stock Exchange (*n*), and the principal cannot, as between himself and the jobber, claim to have his transactions closed at the prices fixed by the Official Assignee for the closing of the transactions of the defaulting broker (*n*). Nor is the right of the jobber to recover against the principal affected by his having claimed and received the difference between the contract and hammer prices from the broker's estate (*p*).

7. A broker, authorized by several principals to deal on the Stock Exchange in the same security, includes all the orders in one contract with a jobber, according to the usage of the Stock Exchange (*q*). The broker becomes a defaulter before settling day, and his transactions are closed by the Official Assignee in the usual way. Each of the principals may sue, or be sued in his own name by, the jobber in respect of the portion of the contract appropriated to him (*r*).

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(*n*) *Scott v. Ernest*, 1900, 16 T. L. R. 498; *Levitt v. Hamblet*, (1901) 2 K. B. 53; 70 L. J. K. B. 520, C. A.; *Anderson v. Beard*, (1900) 2 Q. B. 260; 69 L. J. Q. B. 610. And see *Ponsolle v. Webber*, (1908) 1 Ch. 254; 77 L. J. Ch. 253.

(*p*) *Stoneham v. Wyman*, 1901, 6 Com. Cas. 174.

(*q*) See Article 39, Illustration 10.

(*r*) *Scott v. Godfrey*, (1901) 2 K. B. 726; 70 L. J. K. B. 954; *Beckhuson v. Hamblett*, (1901) 2 K. B. 73; 70 L. J. K. B. 600, C. A.



## Article 96.

EFFECT ON RIGHT TO SUE THE PRINCIPAL, OF GIVING CREDIT TO OR OBTAINING JUDGMENT AGAINST THE AGENT.

Where an agent enters into a contract in such terms that he is personally liable thereon, and a judgment is obtained against him on the contract, the judgment, although unsatisfied, is, so long as it subsists, a bar to any proceedings against the principal on the contract (*s*).

Where an agent enters into a contract in such terms that he is personally liable thereon, and the other contracting party, with a full knowledge who is the real principal, elects to give exclusive credit to the agent, he is irrevocably bound by his election, and cannot afterwards charge the principal on the contract (*t*). Where such party, knowing who is the principal, sues and recovers judgment against the agent on the contract, he is conclusively deemed to have elected to give exclusive credit to the agent (*u*). Where he has not sued the agent

(*s*) Illustrations 4 to 7.

(*t*) Illustrations 3, 7 and 11. *Smethurst v. Mitchell*, 1859, 28 L. J. Q. B. 241; 1 El. & El. 623; 117 R. R. 374; *Thornton v. Meux*, 1827, M. & M. 43; 31 R. R. 711; *Blaine v. Holland*, 1889, 60 L. T. 285, P. C. As to the fiction whereby the assured is discharged from liability to the underwriters for premiums due in respect of policies of marine insurance, see *Universo Ins. Co. v. Merchants Ins. Co.*, (1897) 2 Q. B. 93; 66 L. J. Q. B. 564, C. A.

(*u*) Illustrations 6 and 7.

to judgment, the question whether he has so elected or not is a question of fact, depending on the circumstances of the particular case (*x*).

Except as in this article provided, the liability of the principal, whether disclosed or undisclosed, upon a contract made on his behalf, is not affected by the circumstances that the agent is personally liable on the contract, and that credit was given to him by the other contracting party (*y*).

#### *Illustrations.*

1. An agent buys goods in his own name, and the seller, not knowing that he is acting on behalf of a principal, or not knowing who the principal is, debits him with the price. The seller, on ascertaining who the principal is, may sue him for the price (*z*):

2. A broker buys goods in his own name, and does not mention the principal to the seller until after he (the broker) becomes insolvent. The principal is liable to the seller for the price, and has no right to set off a debt due to him from the broker (*a*).

3. An agent purchases goods, and the seller, knowing at the time of the contract who the principal is, elects to give exclusive credit to the agent. The seller cannot subsequently change his mind and charge the principal (*b*). So, a hus-

(*x*) Illustrations 8 to 11.

(*y*) Illustrations 1, 2, 7, 8 and 10. *Bottomley v. Nuttall*, 1858, 28 L. J. C. P. 110; 5 C. B. N. S. 122; 116 R. R. 592; *Everett v. Collins*, 1810, 2 Camp. 515; 11 R. R. 785; *Concordia, &c. v. Squire*, 1876, 34 L. T. 824, C. A.; *Young v. White*, 1912, 28 T. L. R. 87. And see Article 95, Illustration 6.

(*z*) *Thomson v. Davenport*, 1829, 9 B. & C. 78; 32 R. R. 578; *Paterson v. Gandasequi*, 1812, 15 East, 62; 13 R. R. 368; *Campbell v. Hicks*, 1858, 28 L. J. Ex. 70; 118 R. R. 898.

(*a*) *Waring v. Favenc*, 1807, 1 Camp. 85; 10 R. R. 638.

(*b*) *Addison v. Gandasequi*, 1812, 4 Taunt. 574; 13 R. R. 689;

band is not liable for the price of necessaries ordered by his wife if the jury find that exclusive credit was given to her (c).

4. An agent contracts in his own name, and judgment is recovered against him on the contract. The judgment, though unsatisfied, is a bar to an action against the principal on the contract (d).

5. An agent ordered goods in his own name, and a judgment was obtained against him for the price. The seller then commenced an action against the principal, who raised the defence of *res judicata*, and obtained judgment. Subsequently, the judgment against the agent was set aside, and the seller then appealed from the decision in favour of the principal. It was held, on the appeal, that the judgment having been set aside, the principal was liable (e).

6. An agent purchases goods in his own name. The seller, after discovering who the principal is, sues the agent to judgment. The seller is conclusively deemed to have elected to look to the agent alone, and cannot subsequently charge the principal (f).

7. A husband and wife were sued jointly for the price of goods supplied to the wife, and judgment was entered against the wife, who in fact bought the goods as agent of her husband. It was held that, the plaintiff having elected to sue the parties jointly and recovered judgment against the wife, he was not entitled to recover against the husband as principal (g). So where, in a similar case, judgment was obtained

*Paterson v. Gandasequi, supra.* There must be actual knowledge who the principal is: *Dunn v. Newton*, 1884, 1 C. & E. 278.

(c) *Bentley v. Griffin*, 1814, 5 Taunt. 356; *Metcalfe v. Shaw*, 1811, 3 Camp. 22; 13 R. R. 740.

(d) *Priestley v. Fernie*, 1865, 34 L. J. Ex. 172; 3 H. & C. 977; *Kendall v. Hamilton*, 1879, 4 A. C. 504; 48 L. J. C. P. 705, H. L.

(e) *Partington v. Hawthorne*, 1888, 52 J. P. 807. But see *Cross v. Matthews*, 1904, 91 L. T. 500.

(f) *Priestley v. Fernie, supra*; *Cross v. Matthews, supra*.

(g) *Morel v. Westmoreland*, (1904) A. C. 11; 73 L. J. Q. B. 93, H. L. See also *Rutherford v. Ounan*, (1913) 2 Ir. R. 265.

against the wife for only a portion of the amount claimed, it was held that the plaintiff was not entitled to recover against the husband in respect of the balance, the fact of signing judgment for part of the claim only being an election to treat the wife as liable for the whole debt to the exclusion of the husband (*h*).

8. A broker purchased cotton and gave the name of his principal, but inserted his own name as buyer, in the sold note. The seller invoiced the cotton to the broker, and called upon him to accept and pay for it, threatening legal proceedings. Held, in an action by the seller against the principal, that these facts did not necessarily amount to an election to give exclusive credit to the broker, and that the question whether the seller had so elected was one of fact for the jury (*i*).

9. A. supplies goods to an agent, and draws a bill upon him for the price, which the agent accepts. When the bill becomes due, A. consents to renew it, adding interest, and again renews the second bill when it becomes due. The third bill is dishonoured, and the agent becomes bankrupt. The principal is liable to A. for the price of the goods, unless A. intended to give exclusive credit to the agent, and the fact of taking the acceptances is not conclusive proof of such an election (*k*).

10. A. bought goods in his own name on behalf of B. The seller discovered that B. was the principal, and subsequently, A. having filed a liquidation petition, a clerk of the seller, for the purpose of proving in the liquidation, made an affidavit treating A. as the debtor, and the affidavit

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(*h*) *French v. Howie*, (1906) 2 K. B. 674; 75 L. J. K. B. 980, C. A., reversing (1905) 2 K. B. 580.

(*i*) *Calder v. Dobell*, 1871, L. R. 6 C. P. 486; 40 L. J. C. P. 224, Ex. Ch.; *Mortimer v. M'Callan*, 1840, 6 M. & W. 58; 55 R. R. 503.

(*k*) *Robinson v. Read*, 1829, 9 B. & C. 449; *Whitwell v. Perrin*, 1858, 4 C. B. N. S. 412; 114 R. R. 785; *Reed v. White*, 1804, 5 Esp. 122; *Tempest v. Ord*, 1815, 1 Madd. 89; *The Huntsman*, (1894) P. 214; *Marsh v. Pedder*, 1815, 4 Camp. 257.

was duly filed. Held, that the seller was not estopped by the affidavit from suing B. for the price of the goods (*l*). No proceedings, short of suing the agent to judgment, are conclusive proof in point of law of an election to credit the agent exclusively; but such an act as proving for the debt against the agent's estate in bankruptcy after the principal becomes known is, of course, strong evidence for the jury of such an election (*l*).

11. A. & Co., who were the managing owners of several ships, which belonged to different principals, instructed insurance brokers to effect various policies on the ships, and accepted bills drawn by the brokers for premiums paid by them, and it was agreed that if any acceptance should be dishonoured, the brokers should be entitled to cancel policies in whole or in part, and apply the return premiums towards payment of A. & Co.'s indebtedness. A. & Co. having become bankrupt, the brokers sued the owners of one of the ships for premiums. Held, that the brokers had elected to take A. & Co. as their sole debtors (*m*).

### Article 97.

#### HOW FAR RIGHT OF RECOURSE TO PRINCIPAL AFFECTED BY A SETTLEMENT BETWEEN PRINCIPAL AND AGENT.

Where a debt or obligation has been contracted through an agent, and the principal is induced by the conduct of the creditor reasonably to believe that the agent has paid the debt or discharged the

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(*l*) *Curtis v. Williamson*, 1874, L. R. 10 Q. B. 57; 44 L. J. Q. B. 27; *Morgan v. Couchman*, 1853, 23 L. J. C. P. 36; 14 C. B. 100; 98 R. R. 555; *Taylor v. Sheppard*, 1835, 1 Y. & Coll. 271; *Fell v. Parkin*, 1882, 52 L. J. Q. B. 99; *MacClure v. Schemeil*, 1871, 20 W. R. 168. And see Article 95, Illustrations 6 and 7.

(*m*) *Lamont v. Hamilton*, (1907) S. C. 628, Sc.

obligation, or that the creditor has elected to look to the agent alone for the payment or discharge thereof, and in consequence of such belief pays or settles, or otherwise deals to his prejudice with the agent, the creditor is not permitted to deny, as between himself and the principal, that the debt has been paid or the obligation discharged, or that he has elected to give exclusive credit to the agent so as to discharge the principal (*n*); but mere delay by the creditor in enforcing his claim, or in making application to the principal for the payment of the debt, or discharge of the obligation, is not sufficient inducement for this purpose, unless there are special circumstances rendering the delay misleading in the particular case (*o*).

Where an agent buys goods in his own name from a person who believes him to be buying on his own account, and whilst the seller continues to give exclusive credit to the agent, believing him to be the principal and not knowing of any other person in the transaction, the principal in good faith pays the agent for the goods, the principal is discharged from liability to the seller (*p*).

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(*n*) Illustrations 1 to 4. *Horsfall v. Fauntleroy*, 1830, 10 B. & C. 755.

(*o*) Illustration 5. *Davison v. Donaldson*, 1882, 9 Q. B. D. 623, C. A. In this case the principal was held not to be discharged by a settlement with his agent, though the creditor made no application to the principal until three years after the debt was contracted, the agent having in the meantime become bankrupt. *Comp. Smethurst v. Mitchell*, 1859, 1 El. & El. 623; 28 L. J. Q. B. 241; 117 R. R. 374; *Fell v. Parkin*, 1882, 52 L. J. Q.-B. 99.

(*p*) *Armstrong v. Stokes*, 1872, 1 L. R. 7 Q. B. 598; 41 L. J. Q. B. 253.

Except as in this article provided, the principal, whether disclosed or undisclosed, is not discharged, nor is the right of recourse to him affected, by the circumstance that he has paid or settled or otherwise dealt to his prejudice with the agent (*q*).

### *Illustrations.*

1. A creditor takes a security from the agent of his debtor, and gives the agent a receipt for the debt. The principal deals to his detriment with the agent on the faith of the receipt. The principal is discharged from liability to the creditor (*r*).

2. An agent of a debtor offers to pay the debt either in cash or by a bill of exchange. The creditor takes a bill in payment, and it is dishonoured. If the agent had funds of the principal's wherewith to pay the debt, or if the principal deals to his prejudice with the agent on the faith of his having paid it, the principal is discharged from liability to the creditor (*s*).

3. Goods were sold, on the terms that they should be paid for in cash, to an agent who appeared to be buying on his

This case must be treated as still being law, because it has not been definitely overruled. It is, however, of very doubtful authority, and certainly will not be in the least extended. See per Brett, L. J., in *Irvine v. Watson*, 1880, 5 Q. B. D. 414; 49 L. J. Q. B. 531. The decision was expressly confined to the circumstances of the particular case, and was not founded on any general principle.

(*q*) Illustration 5. *Heald v. Kenworthy*, 1855, 10 Ex. 739; 24 L. J. Ex. 76; 102 R. R. 800; *Dent v. Dunn*, 1812, 3 Camp. 296; 13 R. R. 809; *Nelson v. Powell*, 1784, 3 Doug. 410; *Macfarlane v. Giannacopulo*, 1858, 3 H. & N. 860; 117 R. R. 1014; *Pratt v. Willey*, 1826, 2 C. & P. 350. And see Article 95, Illustrations 6 and 7.

(*r*) *Wyatt v. Hertford*, 1802, 3 East, 147; *Smyth v. Anderson*, 1849, 7 C. B. 21; 18 L. J. C. P. 109.

(*s*) *Smith v. Ferrand*, 1827, 7 B. & C. 19. Comp. cases cited under Article 96, Illustration 9.

own account. The seller omitted to enforce cash payment, and the principal, not knowing that the seller had not been paid, paid the agent for the goods. Held, that the principal was discharged (*t*).

4. The agent of a debtor paid the debt by means of his own cheque, and the creditor neglected to present the cheque for four weeks, when it was dishonoured, and the agent absconded. There was a reasonable chance that the cheque would have been honoured if it had been presented within three weeks, and the principal had dealt to his detriment with the agent on the faith of the payment. Held, that the principal was discharged (*u*).

5. A. employed a broker to buy oil. The broker bought from B., telling him that he was acting for a principal, the terms being that the oil should be paid for by "cash on or before delivery." B. delivered the oil without payment, and A., not knowing that B. had not been paid, in good faith paid the broker. The broker soon afterwards became insolvent, and B. sued A. for the price of the oil. It was proved that it was not the invariable custom in the oil trade to insist on prepayment in the case of a sale for "cash on or before delivery." Held, that, in the absence of such an invariable custom, the mere omission to insist on prepayment was not such conduct as would reasonably induce A. to believe that the broker had paid for the oil, and that, therefore, A. was liable to B. for the price (*x*).

(*t*) *MacClure v. Schemel*, 1871, 20 W. R. 168. *Comp. Kymer v. Suwercropp*, 1807, 1 Camp. 109; 10 R. R. 646. Illustration 5.

(*u*) *Hopkins v. Ware*, 1869, L. R. 4 Ex. 268; 39 L. J. Ex. 147.

(*x*) *Irvine v. Watson*, 1880, 5 Q. B. D. 102, 414; 49 L. J. Q. B. 239, 531, C. A.; *Davison v. Donaldson*, 1882, 9 Q. B. D. 623, C. A. The principal must show that he was induced to settle with the agent by the conduct of the creditor, and that he was reasonably misled by such conduct. It is merely an instance of the principle of estoppel by conduct.



## Article 98.

FRAUD, MISREPRESENTATIONS, OR KNOWLEDGE OF AGENT  
MAY BE SET UP IN AN ACTION BY THE PRINCIPAL.

Where a principal seeks to enforce a contract negotiated or made by his agent, the fraud, misrepresentation, non-disclosure, or knowledge of either the principal or the agent may be set up by the other contracting party by way of defence, in the same manner, and with the same effect, as the fraud misrepresentation, non-disclosure, or knowledge of the principal might have been if he had himself negotiated or made the contract (*y*).

*Illustrations.*

1. A person is induced by the material misrepresentations of the directors to contract to take shares in a company. He is entitled to have the contract rescinded, and his name removed from the register of shareholders, and to be repaid the amount paid for the shares (*z*), provided that he takes steps for that purpose immediately he discovers the misrepresentations, and before the commencement of the winding-up of the company, but not otherwise (*a*). So, if a person is

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(*y*) See Illustrations. *Raphael v. Goodman*, 1838, 8 A. & E. 565; *Foster v. Green*, 1862, 7 H. & N. 881; *Whurr v. Devenish*, 1904, 20 T. L. R. 385.

(*z*) *Reese River Mining Co. v. Smith*, 1869, L. R. 4 H. L. 64; 39 L. J. Ch. 849; *Wainwright's case*, 1890, 6 T. L. R. 413, C. A.; *Western Bank of Scotland v. Addie*, 1867, L. R. 1 H. L. (Sc.) 145, H. L. See also *Hilo Manufacturing Co. v. Williamson*, 1912, 28 T. L. R. 164, C. A.

(*a*) *Oakes v. Turquand*, 1867, L. R. 2 H. L. 325; 36 L. J. Ch. 949, H. L.; *Ogilvie v. Currie*, 1868, 37 L. J. Ch. 541; *Stone v. City and County Bank*, 1877, 47 L. J. C. P. 681; 3 C. P. D. 282, C. A.; *Pawle's case*, 1869, L. R. 4 Ch. 497; 38 L. J. Ch. 412; *Tennent v. Glasgow*

induced by the misrepresentations of an insurance agent to effect a policy, the insurance company is not entitled to retain the benefit of the contract, though it did not authorize the misrepresentations (*b*).

2. An agent who was employed to find a purchaser for certain property misrepresented certain facts bearing on the value of the property. Specific performance was refused (*c*). So, where an agent, in negotiating for the purchase of property, falsely denied that he was buying it on behalf of a certain person, with the knowledge that if he disclosed the fact the other party would not enter into the contract, the Court refused to decree specific performance (*d*).

3. A local agent of a bank lends money to an executor, who mortgages property of the testator to the banker as security for repayment. The executor, to the knowledge of the agent, intended to and does misapply the money. The mortgage is invalid, and the banker has no claim against the estate of the testator (*e*).

4. A., knowing that his sheep are diseased, employs an agent to sell them, and conceals their condition from him,

*Bank*, 1879, 4 A. C. 615, H. L.; *Burgess's case*, 1880, 15 Ch. D. 507; 49 L. J. Ch. 541. Comp. *Re International Socy. of Auctioneers, Baillie's case*. (1898) 1 Ch. 110; 67 L. J. Ch. 81. Rescission of the contract is, apparently, the only remedy against the company. A person induced by misrepresentations to become a member of a company cannot, at all events after the commencement of the winding-up of the company, while he is still a member, maintain an action against the company for damages for the misrepresentations, even if they were made fraudulently: *Houldsworth v. Glasgow Bank*, 1880, 5 A. C. 317, H. L.

(*b*) *Refuge Assurance Co. v. Kettlewell*, (1909) A. C. 243; 78 L. J. K. B. 519, H. L.; *Hughes v. Liverpool, &c. Socy.*, (1916) 2 K. B. 482; 85 L. J. K. B. 1643, C. A.

(*c*) *Mullens v. Miller*, 1882, 22 Ch. Div. 194; 52 L. J. Ch. 380; *Myers v. Watson*, 1851, 1 Sim. N. S. 523; 89 R. R. 173; *Wilde v. Gibson*, 1848, 1 H. L. Cas. 605; 73 R. R. 191; *Winch v. Winchester*, 1812, 1 V. & B. 375; 12 R. R. 238.

(*d*) *Archer v. Stone*, 1898, 78 L. T. 34; *Whurr v. Devenish*, 1904, 20 T. L. R. 385. Comp. *Nash v. Dix*, 1898, 78 L. T. 445.

(*e*) *Collinson v. Lister*, 1855, 7 De G. M. & G. 634; 109 R. R. 267.

intending him to sell them as sound. The agent, believing the sheep to be sound, so represents them to the purchaser. The contract is voidable, on the ground of the principal's fraud (*f*).

5. A. instructed B. to re-insure an overdue ship at a certain rate. B. was unable to obtain the rate mentioned, but received a quotation at a higher rate from C. B. then heard that the vessel was lost, and wired in A.'s name to C. to insure at the higher rate. Subsequent negotiations took place between A. and C., and ultimately C. re-insured the vessel at a higher rate than that originally quoted by him. The jury found that the insurance was effected through B.'s agency. Held, that A. could not recover on the policy, because B. had not disclosed to C. the fact that he had heard of the loss of the ship (*g*).

6. An agent sent notes to his principal by carrier, and they were lost in transit. The carrier had given notice to the principal that he would not be liable for the loss of notes, but had not given any such notice to the agent. An action being brought by the principal in respect of the loss of the notes, it was held that the carrier was not liable (*h*).

7. A partner sold certain goods, and they were packed, to his knowledge, for the purpose of smuggling. Held, that the firm were not entitled to recover the price of the goods, though the other partners were not aware of the illegal nature of the transaction (*i*).

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(*f*) *Ludgater v. Love*, 1881, 44 L. T. 694, C. A.; *Cornfoot v. Fowke*, 1840, 6 M. & W. 358; 55 R. R. 655; *Stevens v. Legh*, 1853, 2 C. L. R. 251.

(*g*) *Blackburn v. Haslam*, 1888, 21 Q. B. D. 144; 57 L. J. Q. B. 479; *Morrison v. Universal Ins. Co.*, 1873, L. R. 8 Ex. 197; 42 L. J. Ex. 115, Ex. Ch. But it is not necessary to disclose information acquired after the slip has been signed by the underwriters: *Cory v. Patton*, 1874, L. R. 9 Q. B. 577; 43 L. J. Q. B. 181.

(*h*) *Mayhew v. Eames*, 1825, 3 B. & C. 601; 27 R. R. 427. See also *Bartlett v. Purnell*, 1836, 4 A. & E. 792; 43 R. R. 484.

• (*i*) *Biggs v. Lawrence*, 1789, 3 T. R. 454; 1 R. R. 740.

8. An agent of a firm of printers contracted with A. for the printing of a certain number of copies of a manuscript which, to the knowledge of both A. and the agent, contained libellous matter. Held, that the printers were not entitled to recover the cost of work done under the contract, although they had no actual notice of the libellous nature of the manuscript, the knowledge of the agent being equivalent to their knowledge (*k*).

### Article 99.

#### HOW FAR PRINCIPAL BOUND BY PAYMENT TO, OR SETTLEMENT WITH, OR SET-OFF AGAINST, AGENT.

Every person who, in dealing with an agent, is led by the conduct of the principal to believe, and does in fact believe, that the agent with whom he is so dealing is the principal in the transaction, is discharged from liability by payment to or settlement with the agent in any manner which would have operated as a discharge if the agent had been the principal (*l*), and is entitled, as against the principal, to the same right of set-off in respect of any debt due from the agent personally as he would have been entitled to if the agent had been the principal (*m*); provided that he had not, at the time when the payment or settlement took place,

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(*k*) *Apthorp v. Neville*, 1907, 23 T. L. R. 575.

(*l*) Illustration 1. *Curlewis v. Birkbeck*, 1863, 3 F. & F. 894. And see *Favenc v. Bennett*, 1809, 11 East, 36; 10 R. R. 425; *Blackburn v. Scholes*, 1810, 2 Camp. 343; 11 R. R. 723.

(*m*) Illustrations 2, 5 and 7. •

or the set-off accrued, received notice that the agent was not in fact the principal (*n*).

Where a principal permits his agent to have the possession of goods, or of the documents of title thereto, he is deemed, for the purposes of this article, by his conduct to hold out the agent as the owner of the goods (*o*).

Where an agent, being duly authorized in that behalf, contracts in his own name in respect of goods upon which he has a lien as against the principal, the right of the principal to sue on the contract, during the time the claim secured by the lien remains unsatisfied, is subservient to that of the agent; and a payment to or settlement with the agent during that time operates as a discharge, notwithstanding that the person making the payment or settlement has had notice from the principal or his trustee in bankruptcy not to pay or settle with the agent (*p*); and such payment or settlement may, to the extent of the claim secured by the lien of the agent, be by way of set-off or settlement of accounts between the agent and the person making the payment or settlement (*p*).

Except as in this article provided, the defendant, in an action by the principal, has no right of set-off in respect of any claim he may have against the

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(*n*) Illustrations 8 and 9. *Ex p. Dixon, Re Henley*, 1876, 4 Ch. D. 133; 46 L. J. Bkey. 20, C. A.

(*o*) Illustration 2.

(*p*) Illustrations 10 and 11.

agent personally (*q*); and the principal is not bound by a payment to or settlement with the agent, unless such payment or settlement was made in the ordinary course of business, and in a manner actually or apparently authorized by him (*r*). Notwithstanding any special custom or usage, it is not deemed to be within the apparent scope of the authority of any agent to receive payment on his principal's behalf by way of set-off or settlement of accounts between himself and the person making the payment (*s*).

#### *Illustrations.*

1. A., the owner of certain goods, permits B. to hold himself out as the owner thereof. B. holds himself out as the owner to C., and C., believing him to be the owner, receives the goods in part payment of a debt owing by B. C. is not liable to A. for the price of the goods (*t*). If an owner of goods permits his agent to sell them as principal, the buyer is discharged by payment to the agent in any way which would have operated to discharge him if the agent had been the true owner (*u*).

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(*q*) Illustrations 3 to 9. *Young v. White*, 1844, 13 L. J. Ch. 418; 7 Beav. 506; 64 R. R. 135; *Gordon v. Ellis*, 1846, 15 L. J. C. P. 178; 2 C. B. 821; *Wester Moffat Colliery Co. v. Jeffrey*, 1911, S. C. 346.

(*r*) Illustrations 12 to 17. *Campbell v. Hassel*, 1816, 1 Stark. 233; *Kaye v. Brett*, 1850, 19 L. J. Ex. 346; 5 Ex. 269; 82 R. R. 659; *Mann v. Forrester*, 1814, 4 Camp. 60; 15 R. R. 724; *Drakeford v. Percy*, 1866, 7 B. & S. 515; *Hughes v. Morris*, 1852, 9 Hare, 636; *Townsend v. Inglis*, 1816, Holt, 278; 17 R. R. 636; *Dunlop v. De Murrieta*, 1886, 3 T. L. R. 166, C. A.

(*s*) See Article 32, Illustrations 7 and 8; Article 39. *Russell v. Bangley*, 1821, 4 B. & A. 395; 34 R. R. 566.

(*t*) *Ramazotti v. Bowring*, 1859, 29 L. J. C. P. 30; 7 C. B. N. S. 851.

(*u*) *Coates v. Lewes*, 1808, 1 Camp. 444; 10 R. R. 725.

*Right of Set-off.*

2. A factor sells goods in his own name, the buyer dealing with him as principal, and believing him to be selling his own goods. The buyer, in an action by the principal for the price of the goods, has a right to set off a debt due to him from the factor personally, provided that the debt was incurred before he had received notice that the goods did not belong to the factor (*x*).

3. A factor sells goods in his own name, the buyer knowing that he is selling them as factor, but not knowing who the principal is. The principal sues the buyer for the price. The buyer has no right to set off a debt due to him from the factor (*y*). The circumstance that the factor sells under a *del credere* commission does not affect this rule (*z*).

4. A broker purchased goods on behalf of A. from a factor who sold them on behalf of B. The broker knew that the factor sold the goods on behalf of a principal, but A. thought that he was selling his own goods. B. sued A. for the price. Held, that A. was bound by the knowledge of his broker, and therefore had no right to set off a debt due to him from the factor (*a*).

5. A broker, who was intrusted by his principal with the possession of goods, sold them in his own name without disclosing the principal. The buyer knew that the broker some-

(*x*) *Borries v. Imperial Ottoman Bank*, 1873, L. R. 9 C. P. 38; 43 L. J. C. P. 3; *Carr v. Hinchliff*, 1825, 4 B. & C. 547; *Rabone v. Williams*, 1785, 7 T. R. 360; 4 R. R. 463; *Buring v. Corrie*, 1818, 2 B. & A. 137; 20 R. R. 383; *George v. Clagett*, 1797, 7 T. R. 359; 4 R. R. 462; *Ex p. Dixon, Re Henley*, 1876, 4 Ch. D. 133; 46 L. J. Bkcy. 20, C. A.

(*y*) *Semenza v. Brinsley*, 1865, 34 L. J. C. P. 161; 18 C. B. N. S. 467; *Moore v. Clementson*, 1809, 2 Camp. 22; 11 R. R. 653; *Fish v. Kempton*, 1849, 18 L. J. C. P. 206; 7 C. B. 687; 78 R. R. 798; *Cooper v. Strauss*, 1898, 14 T. L. R. 233.

(*z*) *Hornby v. Lacy*, 1817, 6 M. & S. 166; 18 R. R. 345.

(*a*) *Dresser v. Norwood*, 1864, 34 L. J. C. P. 48; 17 C. B. N. S. 456, Ex. Ch.

times sold goods in his own name, though acting as a broker, and sometimes sold goods of his own, and in this case had no particular belief one way or the other. Held, that the buyer was not entitled, in an action by the principal for the price, to set off a debt due from the broker personally (*b*). The right to set off, as against the principal, a debt due from the agent, is founded on the principle of estoppel, and to establish such a right the buyer must show that he was led by the conduct of the principal to believe, and did in fact believe, that the agent was acting as principal (*b*).

6. An agent, with the permission of the owner, sold goods as principal. The agent afterwards became bankrupt, and the principal sued the buyer for non-acceptance of the goods. Held, that the defendant was not entitled to set up, by way of defence, that there were mutual credits between the agent and himself resulting in a balance in his favour, because the mutual credits clause of the Bankruptcy Act applies only as between the bankrupt and his creditors (*c*). In order to constitute a right of set-off as against the principal, each of the debts must be liquidated (*c*).

7. A. employed B. to collect general average contributions under an insurance policy. B. instructed a broker to collect the contributions, the broker believing him to be the principal. B. became bankrupt. In an action by A. against the broker for the contributions, as money received to his use, it was held that the defendant was entitled to set off a debt due from B. (*d*).

8. A., who acted as shipping agent for B., a merchant in Havannah, consigned in his own name to C. a cargo of tobacco. C., according to his instructions, insured the cargo for the benefit of all concerned, having had notice that there

(*b*) *Cooke v. Eshelby*, 1887, 12 App. Cas. 271; 56 L. J. Q. B. 505, H. L.; *Baring v. Corrie*, 1818, 2 B. & A. 137; 20 R. R. 383.

(*c*) *Turner v. Thomas*, 1871, L. R. 6 C. P. 610; 40 L. J. C. P. 271. See 4 & 5 Geo. 5, c. 59, s. 31.

(*d*) *Montagu v. Forwood*, (1893) 2 Q. B. 350, C. A.



was a principal. The cargo was lost, and the insurance money was paid to C. after he had received notice that B. claimed it. Held, that C. was not entitled to set off, as against B., debts due to him from A. personally (*e*).

9. Goods were consigned to an agent for sale. The agent pledged the goods to certain brokers as security for a specific advance, and authorized them to sell. The brokers sold the goods, but before receiving the proceeds had notice that the principal was the owner, and that he claimed the proceeds. Held, that the principal was entitled to the balance of the proceeds after deducting the amount of the advance, and that the brokers were not entitled to set off such balance against a general account due to them from the agent (*f*). Otherwise, if they had received the proceeds in the *bonâ fide* belief that they belonged to the agent, and had credited the amount in the account with the agent before receiving notice of the principal's claim (*g*).

*Where the agent has a lien.*

10. A factor, who has a lien on certain goods for advances, sells the goods in his own name. The buyer, though he knew that the factor was acting as an agent, is to the extent of the factor's lien discharged by a payment to him, even if the payment is by way of set-off (*h*), or is made after the bankruptcy of the principal, and after notice from the trustee in bankruptcy not to pay the factor (*i*).

(*e*) *Mildred v. Maspons*, 1883, 8 App. Cas. 874; 53 L. J. Q. B. 33, H. L.

(*f*) *Kaltenbach v. Lewis*, 1885, 10 App. Cas. 617; 55 L. J. Ch. 58, H. L.

(*g*) *Ibid.*; *New Zealand and Australian Land Co. v. Watson*, 1881, 7 Q. B. D. 374; 50 L. J. Q. B. 433, C. A.

(*h*) *Warner v. M'Kay*, 1836, 1 M. & W. 591. This case was decided independently of the question of the extent of the factor's lien, but I do not think that it can now be considered good law, except to the extent stated in the text: *ante*, Illustration 5.

(*i*) *Drinkwater v. Goodwin*, 1775, Cowp. 251.

11. A factor, who had a lien on certain goods in excess of their value, sold the goods to A., to whom he was indebted. The factor became bankrupt. A. gave credit for the price of the goods, and proved in the bankruptcy for the residue of his debt against the factor. Held, that this settlement was a good answer to an action by the principal against A. for the price (*k*).

12. A broker sells goods in the name of his principal to A., who pays the broker for them. The broker absconds without paying over the money to the principal. A. is liable to the principal for the price of the goods, unless the broker had authority, or was held out by the principal as having authority, to receive payment, and the mere fact that the principal had on previous occasions authorized him to receive payment for goods sold on his behalf is not sufficient evidence of such authority or holding out (*l*).

*Payment to or settlement with agent.*

13. A power of attorney to sell certain stock was given through a country stockbroker to his London agent. The agent sold the stock, and settled with the country broker, who was not authorized to receive payment. The principal did not receive any part of the money. Held, that the principal was not bound by the settlement with the broker, and that the London agent was liable to him for the proceeds of the stock (*m*).

14. An auctioneer sold goods by auction, the conditions providing that the deposit should be paid to him at once, and the balance of the purchase-money on or before delivery. The purchaser duly paid the deposit, and on delivery of the goods gave the auctioneer a bill of exchange for the balance. Before the bill matured, the principal revoked the auctioneer's

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(*k*) *Hudson v. Granger*, 1821, 5 B. & A. 27; 24 R. R. 268.

(*l*) *Linck v. Jameson*, 1886, 2 T. L. R. 206, C. A.

(*m*) *Crossley v. Mayniac*, (1893) 1 Ch. 594.

authority to receive payment, and gave notice of the revocation to the purchaser. Held, that the purchaser was not discharged by the payment to the auctioneer, it not being shown that he was authorized, or that it was customary, to take bills of exchange in payment (*n*). A payment to an agent who is known to be such must be in cash in order to bind the principal, unless he authorized the agent, or held him out as having authority, to receive payment in some other form (*o*). But a custom in a particular business to receive payment by cheque is reasonable and binding (*p*).

15. A. was a traveller for a firm to whom B. was indebted, and had authority to collect debts due to the firm. The firm wrote a letter to A., saying, "We should like to draw for the amount." A. showed the letter to B., who thereupon accepted a bill drawn in blank, and payable to "my order." A. afterwards filled in his own name as drawer, and misappropriated the proceeds of the bill. Held, that the firm were not bound by the payment (*q*).

16. An agent is authorized to sell certain goods and receive payment. He sells the goods, and the buyer, knowing that he is acting as an agent, pays him before the credit has expired, deducting discount. The agent does not pay over the money to the principal, and becomes bankrupt before payment is due under the terms of the contract of sale. The principal is not bound by the payment, unless it be shown that it is customary in the ordinary course of the particular

(*n*) *Williams v. Evans*, 1866, L. R. 1 Q. B. 352; 35 L. J. Q. B. 111.

(*o*) *Sykes v. Giles*, 1839, 5 M. & W. 645; 9 L. J. Ex. 106; 52 R. R. 870; *Burker v. Greenwood*, 1836, 2 Y. & C. 414; 47 R. R. 431; *Coupe v. Collyer*, 1890, 62 L. T. 927; Article 32, Illustrations 4 to 8. Comp. *Anderson v. Hillies*, 1852, 21 L. J. C. P. 150; 12 C. B. 499; 92 R. R. 775.

(*p*) *Bridges v. Garrett*, 1870, L. R. 5 C. P. 451; 39 L. J. C. P. 251, Ex. Ch. Such a custom must be proved.

(*q*) *Hogarth v. Wherley*, 1875, L. R. 10 C. P. 630; 44 L. J. C. P. 330. Compare *International Sponge Importers v. Watt*, (1911) A. C. 279; 81 L. J. P. C. 12, H. L.

business to make payments before they are due, or that the agent had authority to receive payment otherwise than in accordance with the terms of the contract (*r*).

17. An insurance broker, being authorized to settle and receive payment of a claim under a policy, takes a bill of exchange from the insurer in payment of a general account, including the claim in question, and subsequently discounts the bill, which is duly paid by the insurer. The broker fails without having paid his principal. The principal is not bound by the payment to the broker, it being contrary to the usual custom for an insurance broker to receive payment by a bill of exchange (*s*).

Sect. 3.—*Liability of the principal for wrongs of agent.*

Article 100.

CROWN NOT LIABLE FOR WRONGS OF PUBLIC AGENTS.

There is no remedy against the Crown, by petition of right or otherwise, for any wrongful act or omission of a public agent (*t*).

Article 101.

PRINCIPAL LIABLE FOR ALL AGENT'S WRONGS IN COURSE OF EMPLOYMENT ON HIS BEHALF.

Where loss or injury is caused to any third person by any wrongful act or omission of an

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(*r*) *Catterall v. Hindle*, 1867, L. R. 2 C. P. 368, Ex. Ch.; *Heisch v. Carrington*, 1833, 5 C. & P. 471; 38 R. R. 835, 840; *Breming v. Mackie*, 1862, 3 F. & F. 197.

(*s*) *Hine v. S.S. Ins. Syndicate*, 1895, 72 L. T. 79, C. A.

(*t*) *Tobin v. Reg.*, 1864, 33 L. J. C. P. 199; 16 C. B. N. S. 310; *Feather v. Reg.*, 1865, 35 L. J. Q. B. 200; 6 B. & S. 257; *Canterbury v. Att.-Gen.*, 1842, 12 L. J. Ch. 281; 1 Ph. 306; 65 R. R. 393.

agent while acting or purporting to act on behalf of the principal ( $u$ ), either in the ordinary course of his employment ( $x$ ), or with the authority of the principal ( $y$ ), the principal is liable therefor jointly and severally with the agent ( $z$ ).

Provided, that no action will lie against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members, in respect of any wrong alleged to have been committed by or on behalf of the trade union ( $a$ ).

#### *Illustrations.*

1. A factor makes representations as to the quality of goods sold on his principal's behalf. The principal is liable in an action for deceit, even if he did not authorize the factor

( $u$ ) See Article 104.

( $x$ ) *Bartonshill Coal Co. v. Reid*, 1858, 3 Macq. 283, 306, H. L. And see Illustrations, and Article 104.

( $y$ ) Illustrations 4 and 5. *Schuster v. M'Kellar*, 1857, 7 E. & B. 704; 26 L. J. Q. B. 281; 110 R. R. 785; *Robinson v. Vaughton*, 1838, 8 C. & P. 252; *Glynn v. Houstoun*, 1841, 2 M. & G. 337.

( $z$ ) A judgment against the agent, though unsatisfied, is, however, a bar to any action against the principal in respect of the same wrong. *Brinsmead v. Harrison*, 1872, L. R. 7 C. P. 547; 41 L. J. C. P. 190; *Wright v. L. G. O. Co.*, 1877, 2 Q. B. D. 271; 46 L. J. Q. B. 429; *Buckland v. Johnson*, 1854, 15 C. B. 145; 23 L. J. C. P. 204; 100 E. R. 280. Cf. *Goldrei v. Sinclair*, (1918) 1 K. B. 180; 87 L. J. K. B. 261, C. A. As to intentional wrongs, see also Article 105.

( $a$ ) The Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4. The section applies whether the alleged wrong is committed in contemplation or furtherance of a trade dispute or not: *Vacher v. London Society of Compositors*, (1913) A. C. 107; 82 L. J. K. B. 232, H. L.

to make the misrepresentations, to the same extent as if he had made them himself (*b*).

2. An agent, while acting in the ordinary course of his employment on the principal's behalf, infringes a patent or trade-mark. The principal is liable for the infringement (*c*).

3. A bailiff wrongfully distrains chattels after having improperly refused a tender of the rent and expenses. The landlord for whom he is acting is liable for the wrongful distress (*d*). So, if the bailiff continues the distress, after a tender of the rent and expenses to the landlord (*e*).

4. A., being hired to sing at a music-hall, and being permitted to choose his own song, sang a song infringing B.'s copyright. No control was exercised by the proprietor of the music-hall to prevent infringement of copyright. Held, that there was sufficient evidence for the jury of authority to sing the song complained of to render the proprietor liable in an action by B. for the infringement (*f*).

5. A., the chairman at a meeting, at the request of B., who took part in the meeting, made a defamatory statement concerning C., and both A. and B. expressed a desire that the reporters present would take notice of the case. Correct reports having been published, it was held, in an action by

(*b*) *Hern v. Nichols*, 1 Salk. 289.

(*c*) *Betts v. De Vitre*, 1868, L. R. 3 Ch. 429; 37 L. J. Ch. 325; *Tonge v. Ward*, 1869, 21 L. T. 480.

(*d*) *Hatch v. Hale*, 1850, 15 Q. B. 10; 19 L. J. Q. B. 289; 81 R. R. 480; *Hurry v. Rickman*, 1831, 1 M. & Rob. 126. And see *Gauntlett v. King*, 1857, 3 C. B. N. S. 59; 111 R. R. 539; *Freeman v. Rosher*, 1849, 13 Q. B. 780; 18 L. J. Q. B. 340; 78 R. R. 514; *Haselar v. Lemoyne*, 1858, 5 C. B. N. S. 530; 28 L. J. C. P. 103. The distinctions made in these cases between the actions of trespass and case are not of importance since the Judicature Act, 1873; the liability of the landlord now depends simply upon whether in doing the wrongful act the bailiff is acting on his behalf, and in the ordinary course of his employment or with his authority.

(*e*) *Smith v. Goodwin*, 1833, 2 L. J. K. B. 192; 4 B. & Ad. 413; 38 R. R. 272.

(*f*) *Monaghan v. Taylor*, 1886, 2 T. L. R. 685.

C. for libel, that there was evidence for the jury of publication by A. and B. through the reporters, whom they had made their agents (*g*).

6. A servant of an incorporated company, in the ordinary course of his employment on the company's behalf, wrongfully refuses to deliver up goods to the owner. The company is liable for the conversion (*h*). A corporation is liable for the wrongs of its agents to the same extent as an individual principal would be (*i*). So, municipal and public authorities, though acting in the performance of a public duty, without reward or funds, are liable for the negligence, in the course of their employment, of agents employed by them (*k*).

7. Certain opium, forming part of a ship's cargo, was damaged in the course of the voyage, and was sold by the master. Held, that there being no necessity for the sale, the shipowners were liable to the consignee for the value of the opium (*l*). An unnecessary sale by a shipmaster of any part of the cargo is a conversion for which the shipowners are liable (*m*).

(*g*) *Parkes v. Prescott*, 1869, L. R. 4 Ex. 169; 38 L. J. Ex. 105.

(*h*) *Giles v. Taff Vale Rail. Co., Taff Vale Rail. Co. v. Giles*, 1853, 23 L. J. Q. B. 43; 2 El. & Bl. 822; 95 R. R. 832, Ex. Ch.; *Yarborough v. Bank of England*, 1812, 16 East, 6; 14 R. R. 272; *Barnett v. Crystal Palace Co.*, 1861, 4 L. T. 403.

(*i*) *Ranger v. G. W. Rail.*, 1854, 5 H. L. Cas. 72; 101 R. R. 46, H. L.; *Smith v. Birmingham Gas Co.*, 1834, 3 L. J. K. B. 165; 3 N. & M. 771; 40 R. R. 358; *Maund v. Monmouth Canal Co.*, 1842, 4 M. & G. 452.

(*k*) *Scott v. Manchester*, 1857, 26 L. J. Ex. 406; 2 H. & N. 204; 115 R. R. 493, Ex. Ch.; *Cowley v. Sunderland*, 1861, 30 L. J. Ex. 127; 6 H. & N. 565; *Mersey Docks Trustees v. Gibbs*, 1864, L. R. 1 H. L. 93, H. L.; *Coe v. Wise*, 1866, L. R. 1 Q. B. 711; 37 L. J. Q. B. 262; *The Rhosina*, 1885, 10 P. D. 131; 54 L. J. P. 72, C. A.

(*l*) *Tronson v. Dent*, 1853, 8 Moo. P. C. 419; 97 R. R. 62, P. C.

(*m*) *Eubank v. Nutting*, 1849, 7 C. B. 797; 78 R. R. 830; *Cannon v. Meaburn*, 1823, 1 Bing. 243; *Van Omeron v. Dowick*, 1809, 2 Camp. 42; 11 R. R. 656.

8. A solicitor, by an indorsement on the back of a writ of execution, directing the sheriff to levy the goods and chattels of a judgment debtor, misled the sheriff by giving the address of the debtor's father, and the father's goods and chattels were wrongfully seized by the sheriff. Held, that the client was liable for the wrongful seizure, it being part of the solicitor's duty, in the ordinary course of his employment, to indorse the writ (*n*). Otherwise, where a solicitor, in issuing a writ, verbally directed the sheriff to seize particular chattels which were not the debtor's property (*o*).

9. A. employed B., a solicitor, to sue for a debt. C., who was B.'s agent, issued execution after the debt had been paid to B., C. being ignorant of such payment. Held, that both A. and B. were liable for the trespass (*p*).

10. A carman was permitted by his employer to take an hour for dinner, but was not permitted to go home to dine, nor to leave his horse. He left his horse unattended and went home to dinner. The horse bolted, and caused damage. Held, that the jury were justified in finding that the damage was caused by the negligence of the carman in the course of his employment, for which the employer would be liable (*q*). So, where a carman left a coal-shoot open in the highway, his employer was held liable for injury resulting therefrom (*r*).

(*n*) *Morris v. Salberg*, 1889, 22 Q. B. D. 614, C. A.; *Jarmain v. Hooper*, 1843, 1 D. & L. 769; 64 R. R. 861; *Lee v. Rumilly*, 1891, 55 J. P. 519, C. A.; *Collett v. Foster*, 1857, 26 L. J. Ex. 412; 2 H. & N. 356; 115 R. R. 586. Comp. *Condy v. Blaiberg*, 1891, 55 J. P. 580, C. A.; *Hewitt v. Spiers*, 1896, 13 T. L. R. 64, C. A.

(*o*) *Smith v. Keal*, 1882, 9 Q. B. D. 340, C. A.

(*p*) *Bates v. Pilling*, 1826, 6 B. & C. 38; *Re Ward*, 1862, 31 Beav. 1. See also *Clissold v. Cratchley*, (1910) 2 K. B. 244; 79 L. J. K. B. 635, C. A.

(*q*) *Whatman v. Pearson*, 1868, L. R. 3 C. P. 422. And see *Engelhart v. Farrant*, (1897) 1 Q. B. 240; 66 L. J. Q. B. 122, C. A.; *Abraham v. Bullock*, 1902, 86 L. T. 796, C. A. Comp. Article 104, Illustrations 8 and 9.

(*r*) *Whiteley v. Pepper*, 1876, 2 Q. B. D. 276; 46 L. J. Q. B. 436.



11. A. sent a barge under the management of his lighterman to be loaded at a wharf. The foreman at the wharf directed the lighterman to move another barge out of his way, and the lighterman did so, causing damage to such other barge. Held, that A. was liable to make good the damage (*t*).

12. A harbour master gave the master of a ship permission to use a certain lock for the purpose of clearing the propeller, and represented that the lock was level, and that the ship might safely ground there, other vessels having on previous occasions been grounded in the same lock under similar circumstances. The ship was damaged by a sill projecting several inches above the level across the middle of the lock. Held, that the harbour master was acting within the scope of his authority in giving permission to use the lock, and in representing that the ship might safely ground, and that the owners of the dock were liable for the injury (*u*).

13. A master told his servant to lay rubbish near a neighbour's wall, but so as not to touch the wall. The rubbish ran against the wall. Held, that the master was liable for the trespass (*x*).

14. An inspector of a railway company gave a passenger into custody on a charge of refusing to give up his ticket or pay his fare, and thereby defrauding the company. Held, that the company, having power to arrest passengers committing such a fraud, was liable in an action for false imprisonment, the inspector being its representative at the station in question, and having made a mistake in arresting

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(*t*) *Page v. Defries*, 1866, 7 B. & S. 137; overruling *Lamb v. Palk*, 1840, 9 C. & P. 629.

(*u*) *The Apollo*, (1891) A. C. 499; 61 L. J. P. 25, H. L.; *The Burlington*, 1895, 72 L. T. 890, C. A.; *The Ratata*, (1898) A. C. 513; 67 L. J. P. 73, H. L.; *East London Harbour Board v. Caledonia Shipping Co.*, (1908) A. C. 271; 77 L. J. P. C. 111; *The Bien*, 1910, 27 T. L. R. 9.

(*x*) *Gregory v. Piper*, 1829, 9 B. & C. 591; 33 R. R. 268.

the plaintiff (*y*). So, where a tram conductor, who had authority to seize anyone seeking to avoid payment of his fare, gave a passenger into custody for tendering what the conductor thought was bad money, the company was held liable (*z*). So, where the manager of a restaurant gave into custody a person who he thought was acting in a riotous manner, the employers were held liable in an action for false imprisonment (*a*).

15. A porter, in the erroneous belief that a passenger was in the wrong train, violently pulled him out of the railway carriage, and the passenger was injured. It was the duty of the porter, so far as possible, to prevent passengers from going by wrong trains, but not to remove them from carriages. Held, that the jury were justified in finding that it was an act done by the porter in the course of his employment, for which the company would be liable. He simply did in an improper manner what he was employed to do (*b*).

16. A tram conductor negligently and brutally pushed a passenger off the tram because he refused to pay his fare. The company was held liable for the assault and injury (*c*).

(*y*) *Moore v. Metropolitan Rail. Co.*, 1872, L. R. 8 Q. B. 36; 42 L. J. Q. B. 23; *Goff v. G. N. Rail.*, 1861, 30 L. J. Q. B. 148; 3 El. & El. 672; *Farry v. G. N. Rail.*, (1898) 2 Ir. R. 352. As to arrest by a special police constable employed by a railway company, see *Lambert v. G. E. Rail. Co.*, (1909) 2 K. B. 776; 79 L. J. K. B. 32, C. A. Comp. Article 104, Illustrations 5 and 6.

(*z*) *Furlong v. South London Tram. Co.*, 1884, 48 J. P. 329; 1 C. & E. 316. Comp. *Knight v. North Met. Tram. Co.*, 1898, 78 L. T. 227.

(*a*) *Ashton v. Spiers*, 1893, 9 T. L. R. 606. Comp. *Stedman v. Baker*, 1896, 12 T. L. R. 451, C. A.

(*b*) *Bayley v. M. S. & L. Rail.*, 1873, L. R. 8 C. P. 148; 42 L. J. C. P. 78, Ex. Ch.; *Lowe v. G. N. Rail.*, 1893, 62 L. J. Q. B. 524.

(*c*) *Smith v. North Met. Tram. Co.*, 1891, 55 J. P. 630, C. A. See also *East. Counties Rail. Co. v. Broom*, 1851, 6 Ex. 314; 20 L. J. Ex. 196; 86 R. R. 310, Ex. Ch.; *Whittaker v. L. C. C.*, (1915) 2 K. B. 676; 84 L. J. K. B. 1446; *Hutchins v. L. C. C.*, 1915, 85 L. J. K. B. 1177, H. L. The fact that the agent has been convicted and

So, where a passenger who misconducted himself was carelessly and with unnecessary violence dragged from a tram by the conductor and thrown to the ground, the employer was held liable for the injury (*d*).

17. A., the owner of a motor car, was in negotiation for the sale of it to B. During a run by A., B. and B.'s son, in order to test the car, A., after driving for a time, handed over the care of the car to B.'s son, who caused injury by his negligent driving. It being found that A. had not abandoned control, held that he was liable for the injury (*dd*).

### Article 102.

#### MONEY, ETC. MISAPPROPRIATED BY AGENT.

Where the money or property of a third person is received by an agent while acting within the apparent scope of his authority, or is received by the principal, and is misapplied by the agent, the principal is liable to make good the loss (*e*).

criminally punished for the assault does not affect the liability of the principal: *Dyer v. Munday*, (1895) 1 Q. B. 742; 64 L. J. Q. B. 448, C. A.

(*d*) *Seymour v. Greenwood*, *Greenwood v. Seymour*, 1861, 30 L. J. Ex. 327, Ex. Ch.

(*dd*) *Samson v. Aitchison*, (1912) A. C. 844; 82 L. J. P. C. 1, P. C. See also *Irwin v. Waterloo Taxi-Cab Co.*, (1912) 3 K. B. 588; 81 L. J. K. B. 967, C. A.; *Reichardt v. Shard*, 1914, 31 T. L. R. 24, C. A.

(*e*) *Hackney v. Knight*, 1891, 7 T. L. R. 254; *London Freehold, &c. Co. v. Suffield*, (1897) 2 Ch. 608; 66 L. J. Ch. 790, C. A.; *Trott v. National Discount Co.*, 1900, 17 T. L. R. 37. And see Illustrations, and Article 61, Illustration 4. *Comp. Jacobs v. Morris*, (1902) 1 Ch. 816; 71 L. J. Ch. 363, C. A.

*Illustrations.*

1. A local manager, acting as agent for a bank, induced a lady to invest money in paying off a certain mortgage. The money was paid to him for that purpose, and he misappropriated it. Held, that he was acting within the apparent scope of his authority in receiving the money, which must therefore be deemed to have been received by the bank, and that the bank was liable to repay it (*f*).

2. An agent, acting apparently in the ordinary course of business, sent an account to A., representing that certain advances had been made on his account, and drew on him for the amount. It was within the scope of the agent's authority to make advances of that kind, but he had in fact misappropriated the money, and had not made the advances. A. accepted and paid the bill. Held, that the principal was liable to A. for the amount (*g*).

**Article 103.**

MONEY, ETC. RECEIVED BY, OR APPLIED FOR BENEFIT OF,  
PRINCIPAL.

Where, by any wrongful or unauthorized act of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or value of such money or property.

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(*f*) *Thompson v. Bell*, 1854, 10 Ex. 10; 23 L. J. Ex. 321. Comp. *Bishop v. Jersey*, 1854, 23 L. J. Ch. 483; 2 Drew. 143; 100 R. R. 51; *Russo-Chinese Bank v. Li Yau Sun*, (1910) A. C. 174; 79 L. J. P. C. 60.

(*g*) *Swire v. Francis*, 1877, 3 A. C. 106; 47 L. J. P. C. 18

*Illustrations.*

1. A manager, who had no authority to borrow money or overdraw his principal's account, having overdrawn the account and misapplied the money, borrowed 20*l.* for the alleged purpose of paying the principal's workmen (but really to make up the defalcations), paid it into the principal's account, and drew on the account to pay the workmen. Held, that the 20*l.* having been applied for the benefit of the principal, he was liable to repay the amount to the lender (*h*).

2. The secretary of a company forges and discounts certain bills of exchange, and pays the proceeds to his own account, upon which he draws cheques in favour of the company. The company is liable to the discounteer to the extent that the proceeds of the bills have been applied for its benefit (*i*).

3. An agent sells, under a forged power of attorney, stock belonging to A., and pays the proceeds to his principal's account. The principal is liable to A. for the proceeds (*k*).

4. A banker, having without authority sold certain bonds belonging to A., delivers to A. certain other bonds belonging to B., telling A. that they were taken in exchange for his bonds. A. must deliver up the bonds to B., or pay him their value (*l*).

## Article 104.

## PRINCIPAL NOT LIABLE FOR WRONGS OUTSIDE COURSE OF EMPLOYMENT ON HIS BEHALF.

No principal is liable for any wrongful act or omission of his agent while acting, without the

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(*h*) *Keid v. Rigby*, (1894) 2 Q. B. 40; 63 L. J. Q. B. 451; *Bannatyne v. McIver*, (1906) 1 K. B. 103; 75 L. J. K. B. 120, C. A.; *Reversion Fund, &c. Co. v. Maison Cosway*, (1913) 1 K. B. 364; 82 L. J. K. B. 512, C. A.

(*i*) *Ex p. Shoolbred*, 1880, 28 W. R. 339.

(*k*) *Marsh v. Keating*, 1834, 1 Bing. N. C. 198; 37 R. R. 75, H. L. Com. *Jacobs v. Morris*, (1902) 1 Ch. 816; 71 L. J. Ch. 363, C. A.

(*l*) *Glyn v. Baker*, 1811, 13 East, 509; 12 R. R. 414.

principal's authority, outside the ordinary course of his employment (*m*), or while not acting nor purporting to act on the principal's behalf (*n*).

### *Illustrations.*

1. A bailiff, who is employed to levy a distress for water rates, commits an unnecessary and unauthorized assault in levying the distress. His employer is not liable for the assault (*o*).

2. A solicitor, when issuing a writ of *feri facias*, verbally directs the sheriff to seize particular goods, without the client's authority. The client is not liable for the wrongful seizure, because it is not in the ordinary course of a solicitor's employment to interfere with the sheriff in the performance of his duties (*p*).

3. The manager of a sewage farm, in order to improve the drainage, scoured a brook separating A.'s land from the farm, pared down the bank of A.'s land, and cut down some bushes thereon. Held, that the principals were not liable for the trespasses, which they had not authorized, because it was beyond the scope of the manager's employment to do any act outside the farm (*q*).

4. The conductor of an omnibus, after completion of a journey, and in the absence of the driver, negligently ran down and injured A. while making a slight detour for the

(*m*) Illustrations 1 to 7. *Byrne v. Londonderry Tramway Co.*, (1902) 2 Ir. R. 457, C. A.; *Forsyth v. Manchester Corpn.*, 1912, 107 L. T. 600, C. A.

(*n*) Illustrations 8 to 10. *N. E. Rail. v. Reg.*, 1889, 6 T. L. R. 15, C. A.

(*o*) *Richards v. West Middlesex Waterworks Co.*, 1885, 15 Q. B. D. 660; 54 L. J. Q. B. 551. See also *Lucas v. Mason*, 1875, L. R. 10 Ex. 251; 44 L. J. Ex. 145; *Radley v. L. C. C.*, 1913, 109 L. T. 162.

(*p*) *Smith v. Keal*, 1882, 9 Q. B. D. 340, C. A.; *Hewitt v. Spiers*, 1896, 13 T. L. R. 64, C. A.

(*q*) *Bolinbroke v. Swindon*, 1874, L. R. 9 C. P. 575; 43 L. J. C. P. 287.

purpose of coming to the starting point for the commencement of a fresh journey. It was held that the omnibus company was not liable, there being no evidence to go to the jury that the conductor was acting in the course of his employment (*r*).

5. A station-master detained a person for not having paid the fare for his horse, the railway company having no power to arrest in such cases. Held, that the company was not liable, because it was beyond its powers to authorize the detention, and the act was therefore necessarily outside the scope of the station-master's employment (*s*).

6. A barman gave a person into custody for attempting to pass bad money, the bad money having been returned and good money paid. Held, that the employer was not liable (*t*). So, where a booking clerk gave a person into custody for attempting to steal from the till, after the attempt had ceased, the railway company was held not liable (*u*). The liability of a principal for false imprisonment in such cases depends upon whether it is within the ordinary course of the agent's employment to arrest persons or give them into custody on behalf of the principal, and the general rule is that an agent or servant has implied authority to do so only when such a course is necessary for the protection of his principal's or master's property (*x*).

(*r*) *Beard v. L. G. O. Co.*, (1900) 2 Q. B. 530; 69 L. J. Q. B. 895, C. A. And see *Gwilliam v. Twist*, (1895) 2 Q. B. 84; 64 L. J. Q. B. 474, C. A.; *Harris v. Fiat Motors*, 1906, 22 T. L. R. 556. Comp. *Ricketts v. Tilling*, (1915) 1 K. B. 644; 84 L. J. K. B. 342, C. A.

(*s*) *Poulton v. L. & S. W. Rail. Co.*, 1867, L. R. 2 Q. B. 534; 36 L. J. Q. B. 294. See also *Charleston v. London Tram. Co.*, 1888, 36 W. R. 367, C. A.; *Ormiston v. G. W. Rail. Co.*, (1917) 1 K. B. 598; 83 L. J. K. B. 759. Comp. Article 101, Illustration 14; *Farry v. G. N. Rail.*, (1898) 2 Ir. R. 352.

(*t*) *Abrahams v. Deakin*, (1891) 1 Q. B. 516; 60 L. J. Q. B. 238, C. A.

(*u*) *Allen v. L. & S. W. Rail.*, 1870, L. R. 6 Q. B. 65; 40 L. J. Q. B. 55. Comp. Article 101, Illustration 14.

(*x*) *Edwards v. L. & N. W. Rail.*, 1870, L. R. 5 C. P. 445; 39 L. J. C. P. 241; *Bank of New South Wales v. Owston*, 1879, 4 App.

7. A clerk, without the authority of his master, used his master's lavatory and carelessly left the tap running. Held, that the master was not liable for the damage done (*y*). Otherwise, if the clerk had had permission to use the lavatory (*z*).

8. A carman, having finished work for the day, goes off on a journey of his own for his own purposes, and causes damage by his negligent driving. The employer is not liable (*a*).

9. A servant obtained permission to take out his master's horse and trap for purposes of his own, and proposed to bring something back with him on behalf of the master. Held, that the master was not liable for damage caused by the servant's negligence in the course of the drive (*b*).

10. A collision occurs through the sole negligence or incapacity of a qualified pilot in charge of a ship, at a place where the employment of such a pilot, and the surrender to him of the control of the navigation, is made compulsory by law. The shipowners are not liable, because the pilot is not deemed to be their agent (*c*). Compulsory pilotage consti-

Cas. 270; 48 L. J. P. C. 25; *Walker v. S. E. Rail.*, 1870, L. R. 5 C. P. 640; 39 L. J. C. P. 346; *Rowe v. London Pianoforte Co.*, 1876, 34 L. T. 450; *Roe v. Birkenhead, &c. Rail. Co.*, 1851, 7 Ex. 36; 21 L. J. Ex. 9; 86 R. R. 564; *Stevens v. Hinshelwood*, 1891, 55 J. P. 341, C. A.; *Hanson v. Waller*, (1901) 1 K. B. 390; 70 L. J. K. B. 231; *Line v. R. S. P. C. A.*, 1902, 18 T. L. R. 634.

(*y*) *Stevens v. Woodward*, 1881, 6 Q. B. D. 318; 50 L. J. Q. B. 231.

(*z*) *Ruddiman v. Smith*, 1889, 60 L. T. 708.

(*a*) *Storey v. Ashton*, 1869, L. R. 4 Q. B. 476; 38 L. J. Q. B. 223; *Rayner v. Mitchell*, 1877, 2 C. P. D. 357; *Mitchell v. Crassweller*, 1853, 22 L. J. C. P. 100; 13 C. B. 237; 93 R. R. 517; *Hatch v. L. & N. W. Rail.*, 1899, 15 T. L. R. 246, C. A. Comp. Article 101, Illustration 10.

(*b*) *Cormack v. Digby*, 1876, 9 Ir. R. C. L. 557. Comp. *Patten v. Rea*, 1857, 26 L. J. C. P. 235; 2 C. B. N. S. 606; 109 R. R. 800.

(*c*) 57 & 58 Vict. c. 60, s. 633; *Lucey v. Ingram*, 1840, 6 M. & W. 302; 55 R. R. 621; *The Maria*, 1839, 1 Rob. N. A. 95; *Gen. Steam Nav. Co. v. Colonial S. N. Co.*, 1869, L. R. 4 Ex. 238; 38 L. J. Ex. 97, Ex. Ch.; *The Ole Bull*, (1905) P. 52; 74 L. J. P. 75;



tutes a good defence in the English Courts, even though it be no defence by the law of the place where the collision occurs (*d*). But the owners are liable where the master or crew contribute to the negligence (*e*), or where, by the regulations, the control of the navigation is left to the master, and the pilot is merely his adviser, even if the pilot is in fact allowed to assume the control (*f*). And the presence of a pilot gives no immunity if the collision occurs at a place where it is not compulsory to take a pilot (*g*).

### Article 105.

#### HOW FAR LIABLE FOR INTENTIONAL AND MALICIOUS WRONGS BY AGENT.

Subject to the provisions of Articles 102 and 103, no principal is liable in excess of the value of the benefit (if any) acquired by him (*h*), for any fraud

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*The Assaye*, (1905) P. 289; 74 L. J. P. 145. Comp. *Martin v. Temperley*, 1843, 4 Q. B. 298; 12 L. J. Q. B. 129; 62 R. R. 377. See, however, the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), s. 15, which abolishes the defence of compulsory pilotage as from Jan. 1, 1918.

(*d*) *The Halley*, 1868, L. R. 2 P. C. 193; 37 L. J. Ad. 333, P. C.

(*e*) *The Velasquez*, 1867, L. R. 1 P. C. 494; 36 L. J. Ad. 19; *The Iona*, 1867, L. R. 1 P. C. 426, P. C.; *Clyde Nav. Co. v. Barclay*, 1876, 1 A. C. 790, H. L.; *The Calabar*, 1868, L. R. 2 P. C. 238; *The Schwan*, *The Albano*, (1892) P. 419, C. A.; *The Ripon*, 1885, 10 P. D. 65; 54 L. J. P. 56; *The Tactician*, (1907) P. 244; 76 L. J. P. 80, C. A.; *The Elysia*, (1912) P. 152; 81 L. J. P. 104.

(*f*) *The Guy Mannering*, 1882, 7 P. D. 132; 51 L. J. Ad. 57, C. A.; *The Augusta*, 1887, 57 L. T. 326, C. A.; *The Prins Hendrik*, (1899) P. 177; 68 L. J. P. 86; *The Dallington*, (1903) P. 77; 72 L. J. P. 17.

(*g*) *The Maria*, 1839, 1 Rob. N. A. 95; *The Lion*, 1869, L. R. 2 P. C. 525; 38 L. J. Ad. 51; *The Stettin*, 1862, 31 L. J. Ad. 208; *The Hanna*, 1866, L. R. 1 Ad. 283; 36 L. J. Ad. 1; *Beechgrove SS. Co. v. Aktieselskabet "Fjord"*, (1916) 1 A. C. 364; 85 L. J. P. C. 1, H. L.

(*h*) *Western Bank of Scotland v. Addie*, 1867, L. R. 1 H. L. Sc. 145, H. L.; *Barry v. Croskey*, 1861, 2 Johns. & H. 1. See Article 103.

or other intentional or malicious wrong committed by his agent without his authority, unless it was committed in the ordinary course of the agent's employment (*i*). But every principal, subject to the provisions of Article 101, is civilly liable for every fraud or other intentional or malicious wrong committed by his agent in the ordinary course of his employment (*k*), though he did not authorize it (*k*), and even if he had expressly forbidden it (*l*).

This article extends to cases in which malice in fact is an essential element in the wrong, even if the principal is a corporation or incorporated company (*m*).

#### *Illustrations.*

1. A solicitor's managing clerk, who had a general authority to conduct the conveyancing business of his principal, induced a widow to give him instructions to realise certain properties with a view to the reinvestment of the proceeds. She handed him her title deeds for that purpose, for which he gave her a receipt in his principal's name, and subse-

(*i*) Illustrations 2, 4 to 6. *Lyons v. Martin*, 1838, 7 L. J. Q. B. 214; 8 A. & E. 512; 47 R. R. 637; *Weir v. Bell*, 1878, 3 Ex. D. 238; 47 L. J. Ex. 704, C. A.; *Williams v. Preston*, 1882, 20 Ch. D. 672; 51 L. J. Ch. 927, C. A.; *M<sup>c</sup>Manus v. Crickett*, 1800, 1 East, 106; 5 R. R. 518; *Bishop v. Jersey*, 1854, 2 Drew. 143; 100 R. R. 51; 23 L. J. Ch. 483; *Robb v. Gow*, 1906, 8 F. 90; *Thorne v. Heard*, (1895) A. C. 495; 64 L. J. Ch. 652, H. L.

(*k*) Illustrations 1, 3 to 11. *Doe d. Willis v. Martin*, 1790, 4 T. R. 39; 2 R. R. 324; *Bowles v. Stewart*, 1803, 1 Sch. & Lef. 209. It is no defence that the wrongful act is a felony: *Osborne v. Gillett*, 1873, L. R. 8 Ex. 88.

(*l*) Illustration 7.

(*m*) Illustration 11.

quently, at his request, she signed two documents which were not read over or explained to her, and which she thought were necessary for the realisation of the properties. These documents were in fact conveyances of the properties to himself, and he afterwards disposed of them for his own purposes. Held, that the principal was liable for the fraud (*n*). Where an agent commits a fraud while acting in the ordinary course of his employment, the principal is liable whether the fraud is committed for his benefit or not (*o*).

2. A wharfinger's agent, who had authority to give receipts for goods actually received by him, fraudulently gave a receipt for goods which he had not, in fact, received. Held, that the wharfinger was not liable, the fraud not being committed in the course of the agent's employment (*p*).

3. The servants of an omnibus company, in the course of their employment on behalf of the company, molest and interfere with a person in his use of the highway. The company is liable (*q*).

4. A servant wantonly and not for the purpose of his master's business, strikes the horse of a third person. The master is not liable. Otherwise, if the servant had struck the horse in the course of his employment and for the master's supposed benefit (*r*).

(*n*) *Lloyd v. Grace*, (1912) A. C. 716; 81 L. J. K. B. 1140, H. L. See also *Swire v. Francis*, 1877, 3 App. Cas. 106; 47 L. J. P. C. 18, P. C.; *Malone v. Belfast Banking Co.*, (1912) 2 Ir. R. 187. Comp. Article 81, Illustration 2.

(*o*) *Lloyd v. Grace*, *supra*; *British Mutual Banking Co. v. Charnwood Forest Rail.*, 1887, 18 Q. B. D. 714; 56 L. J. Q. B. 449, C. A.; and *Malcolm v. Waterhouse*, 1908, 24 T. L. R. 854, must be considered overruled.

(*p*) *Coleman v. Riches*, 1885, 24 L. J. P. C. 125; 3 C. L. R. 795. Of doubtful authority since *Lloyd v. Grace*, *supra*.

(*q*) *Green v. L. G. O. Co.*, 1859, 29 L. J. C. P. 13; 7 C. B. N. S. 290.

(*r*) *Croft v. Alison*, 1821, 4 B. & A. 590; 23 R. R. 407; *Ellis v. Turner*, 1800, 8 T. R. 531; 5 R. R. 441. And see *Baker v. Snell*, (1908) 2 K. B. 825; 77 L. J. K. B. 1090, C. A.

5. An omnibus driver, intending to strike with his whip the driver of another bus, struck a passenger and injured him. Held, that the question whether the employer was liable or not depended on whether the act was done in private spite or in the supposed furtherance of the employer's interest (s).

6. A silversmith hired from a jobmaster a brougham and driver for the use of a traveller, it being understood that the traveller would carry valuable samples, and that it would be the duty of the driver to take care of the contents of the brougham during the necessary absence of the traveller. The driver, who was reasonably supposed by the jobmaster to be trustworthy, stole the contents of the brougham during the necessary absence of the traveller. Held, that the jobmaster was not liable for the loss (t).

7. An omnibus driver, in order to prevent a rival bus from passing him, drove recklessly and caused the rival bus to overturn. The driver had received printed instructions from his employers not to race with nor obstruct other buses. Held, that the employers were liable, the wrongful act being done in the course of the servant's employment (u).

8. A wife, who managed a business on her husband's behalf, fraudulently misrepresented the quantity of business done to an intending purchaser, who subsequently bought the business on the faith of such misrepresentations. Held, that the husband was liable for the fraud (v).

9. An agent made fraudulent misrepresentations as to the quality of an article, and a person was thereby induced to purchase it from him for more than its value. Held, that the principal was liable in an action of deceit for the misrepresentations, though they were made without his authority or knowledge (x). So, fraudulent misrepresentations made

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(s) *Ward v. G. O. Co.*, 1873, 42 L. J. C. P. 265, Ex. Ch.

(t) *Cheshire v. Bailey*, (1905) 1 K. B. 337; 74 L. J. K. B. 176, C. A. Comp. *Abraham v. Bullock*, 1902, 86 L. T. 796, C. A.

(u) *Limpus v. L. G. O. Co.*, 1862, 32 L. J. Ex. 34; 1 H. & C. 526, Ex. Ch.

(v) *Taylor v. Green*, 1837, 8 C. & P. 316.

(x) *Udell v. Atherton*, 1861, 30 L. J. Ex. 337; 7 H. & N. 172.

by directors on behalf of a company, bind the company, though the shareholders be not aware either of the misrepresentations or of their falsehood (*y*). A special clause in a contract by which a principal disclaims responsibility for the accuracy of statements made by his agent does not exempt him from liability in the case of fraudulent or reckless misrepresentations by the agent (*z*).

10. It was the duty of an agent of a banking corporation to obtain the acceptance of bills in which the corporation was interested. He fraudulently, and without the knowledge of the directors, made a misrepresentation, whereby a person was misled and induced to accept a bill in which the corporation was interested. Held, that as the misrepresentation was made in the course of the agent's employment and for the benefit of the corporation, the corporation was liable in an action for deceit, though the agent was not authorized to make the representation (*a*).

11. A., who had been an agent of an insurance company, and had entered the service of a rival company, visited policyholders in the first-mentioned company in order to persuade them to transfer their insurances to the rival company, and made derogatory statements concerning the first-mentioned company. B., who was a superintendent of agencies of the first-mentioned company, in order to counteract the injury A. was doing to the company's business, but without being expressly authorized to do so, wrote a circular letter to policyholders containing defamatory statements concerning A. which B. knew to be false. It was held that the malice of B. was imputable to the company, and the libel having been

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(*y*) *National Exchange Co. v. Drew*, 1855, 2 Macq. 103, H. L. See also *Hilo Manufacturing Co. v. Williamson*, 1912, 28 T. L. R. 164, C. A.

(*z*) *Pearson v. Dublin Corporation*, (1907) A. C. 351; 77 L. J. P. C. 1, H. L.

(*a*) *Mackay v. Commercial Bank*, 1874, L. R. 5 P. C. 394; 43 L. J. P. C. 31, P. C.; *Blake v. Albion Life Ass. Society*, 1878, 4 C. P. D. 94; 48 L. J. C. P. 169; *Barwick v. English Joint Stock Bank*, 1867, L. R. 2 Ex. 259, Ex. Ch.

published in the course of B.'s employment, that the company was liable therefor (c). So, it has been held that a voluntary association is liable for a libel published by its servant in the course of his employment, though without special instructions (d). And an action for malicious prosecution is maintainable against a corporation or incorporated company (e).

### Article 106.

#### HOW FAR LIABLE FOR MISREPRESENTATIONS BELIEVED BY AGENT TO BE TRUE.

Where a principal intentionally conceals from his agent circumstances material to the business for which the agent is employed; in order that the agent may make misrepresentations relating to such circumstances, and the agent in good faith makes any such misrepresentation believing it to be true, the principal is liable therefor to the same extent as if the agent had made it fraudulently, knowing it to be false. Whether a principal in the absence of such an intentional concealment, is liable in an

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(c) *Citizen's Life Ass. Co. v. Brown*, (1904) A. C. 423; 73 L. J. P. C. 102, P. C. See also *Whitfield v. S. E. Rail.*, 1858, E. B. & E. 115; 119 R. R. 568; *Rex v. London*, 1858, E. B. & E. 122; *Nevill v. Fine Arts Ins. Co.*, (1895) 2 Q. B. 156; 64 L. J. Q. B. 681, C. A.; *Fitzsimons v. Duncan*, (1908) 2 Ir. R. 483, C. A. Comp. *Glasgow Corporation v. Lorimer*, (1911) A. C. 209; 80 L. J. P. C. 175, H. L.; *Aiken v. Caledonian R. Co.*, (1913) S. C. 66.

(d) *Ellis v. National Free Labour Assn.*, 1905, 7 F. 629.

(e) *Cornford v. Carlton Bank*, (1899) 1 Q. B. 392; 68 L. J. Q. B. 196; *Kent v. Courage*, 1891, 55 J. P. 264; *Edwards v. Mid. Rail.*, 1880, 6 Q. B. D. 287; 50 L. J. Q. B. 281. The dicta of Lord Bramwell in *Abrath v. N. E. Rail.*, 1886, 11 A. C. 247; 55 L. J. Q. B. 457, and Alderson, B., in *Stevens v. Mid. Rail.*, 1854, 10 Ex. 352; 23 L. J. Ex. 328, are not law.

action for damages (*f*), in respect of a statement known by him to be false, but made without his knowledge or authority by an agent who believes it to be true, is a question upon which there is a conflict of authority, and which cannot be considered settled.

In *Cornfoot v. Fowke* (*g*), decided in 1840, in the Court of Exchequer, the circumstances were as follows:—An agent was employed to let a house, and on being asked by C. if there was any objection to the house, said that there was not. On the faith of this representation, C. entered into an agreement for a lease. C. then discovered that the adjoining house was a brothel. In an action against C. for non-performance of the agreement, he pleaded fraud and misrepresentation. It appeared that the principal was aware of the objection to the house, but that the agent was not. Held, that the circumstances did not support the plea, though it would have been otherwise if the principal had expressly authorized the agent to say that the nuisance did not exist, or had intentionally employed an ignorant agent in order that he might innocently make a false statement, believing it to be true. In *Fuller v. Wilson*, 1842 (*h*), an agent who was employed to sell a house described it as being free from taxes, and it was bought on the faith of that description. The principal knew that the house was not free from taxes, but the agent did not. The Court of Queen's Bench held that the principal was liable in an action for deceit, though it did not appear that he had authorized the agent to make any representation as to the taxes. This case, how-

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(*f*) It is now settled that the principal cannot enforce a contract induced by the material misrepresentations of the agent who negotiates it, whether such misrepresentations are fraudulent or not. See Article 98, Illustrations 1 and 2.

(*g*) 6 M. & W. 358; 55 R. R. 655. See also *Brett v. Clouser*, 1880, 5 C. P. D. 376.

(*h*) 3 Q. B. 58. On appeal, 3 Q. B. 68, 1009.

ever, was reversed, on other grounds, on appeal. In *Ludgater v. Love*, 1881 (*i*), an agent who was employed to sell sheep represented them as being sound. The principal knew that the sheep had the rot, and concealed that fact from the agent, intending him to represent them as sound. The Court of Appeal held that the principal was liable in an action for fraudulent misrepresentation, having intentionally employed an agent ignorant of the truth, in order that he might make a false statement. *Cornfoot v. Fowke* was doubted in this case, and was thought to have been decided on a mere point of pleading; but its authority has been strengthened by the judgments of the Lords in *Derry v. Peek* (*k*), and it would seem more logical, if the principal ought to be liable in cases where neither he nor the agent is guilty of fraud, to base his liability on an implied warranty that representations made by the agent in the course of his employment are true.

#### Article 107.

##### NOT LIABLE FOR MISREPRESENTATIONS BY AGENT AS TO CREDIT, ETC. OF THIRD PERSONS.

No action can be maintained against a principal in respect of any representation as to the character, conduct, credit, ability, trade or dealings of another person, to the intent that such other person may obtain credit (*l*), unless such representation is in writing, signed by the principal—the signature of an agent is not sufficient, even if expressly authorized by the principal (*m*).

(*i*) 44 L. T. 694, C. A.

(*k*) 1889, 14 A. C. 337, H. L.

(*l*) "May obtain credit, money or goods upon (*sic*), unless, &c."

(*m*) Lord Tenterden's Act (9 Geo. IV. c. 14), s. 6; *Swift v. Jewesbury*, 1874, L. R. 9 Q. B. 301; 43 L. J. Q. B. 56, Ex. Ch.; *Williams v. Mason*, 1873, 28 L. T. 232. The Act applies to cases where the



Sect. 4.—*Admissions by and notice to agents.*

## Article 108.

AGENT'S ADMISSIONS WHEN EVIDENCE AGAINST THE  
PRINCIPAL.

An admission or representation made by an agent is admissible in evidence against the principal in the following cases : namely,

- (a) Where it was made with the authority, express or implied, of the principal ;
- (b) Where it has reference to some matter or transaction upon which the agent was employed on the principal's behalf at the time when the admission or representation was made, and was made in the ordinary course of that employment (*n*);
- (c) Where it has reference to some matter or transaction respecting which the person to whom the admission or representation was

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principal is an incorporated company; *Hirst v. West Riding Banking Co.*, (1901) 2 K. B. 560; 70 L. J. K. B. 828, C. A.

(*n*) Illustrations 1 to 7. *Standage v. Creighton*, 1832, 5 C. & P. 406; *Meux's Exors.' case*, 1852, 2 De G. M. & G. 522; 95 R. R. 203; *Ellis v. Thompson*, 1838, 3 M. & W. 445; 7 L. J. Ex. 185; 49 R. R. 679. As to statements in bills of lading signed by the master, see *M'Lean v. Fleming*, 1871, 2 H. L. Sc. App. 128, H. L.; *Lishman v. Christie*, 1887, 19 Q. B. D. 333, C. A.; *Smith v. Bedouin S. N. Co.*, (1896) A. C. 70, H. L. Sc.; *Howard v. Tucker*, 1831, 1 B. & Ad. 712; 35 R. R. 418; *The Ida*, 1875, 32 L. T. 541, P. C.; *The Prosperino Palasso*, 1872, 29 L. T. 622; *Compania Naviera Vasconzada v. Churchill*, (1906) 1 K. B. 237; 75 L. J. K. B. 94; *Crossfield v. Kyle Shipping Co.*, (1916) 2 K. B. 885; 85 L. J. K. B. 1310, C. A.

made had been expressly referred by the principal to the agent for information (*o*).

Provided always, that a report made by an agent to his principal cannot be put in evidence against the principal by any third person (*p*).

No principal is bound by any unauthorized admission or representation concerning any matter upon which the agent who made it was not employed on his behalf at the time when it was made (*q*), or which was not made in the ordinary course of the agent's employment (*r*), unless he expressly referred to the agent for information on the particular matter (*s*).

#### *Illustrations.*

1. A parcel sent by railway was lost in transit. The station master, in the ordinary course of his duty, made a statement to the police as to the absconding of a porter.

(*o*) Illustration 8.

(*p*) Illustrations 11 and 12. *Re Djambi (Sumatra) Rubber Estates*, 1912, 107 L. T. 631; *Reyner v. Pearson*, 1812, 4 Taunt. 662; 13 R. R. 723; *Kahl v. Jansen*, 1812, 4 Taunt. 565. See, however, *The Solway*, 1885, 10 P. D. 137; 54 L. J. P. 83.

(*q*) Illustrations 2 to 6. *Fairlie v. Hastings*, 1803, 10 Ves. 123; *Betham v. Benson*, 1818, Gow, 45; *Peto v. Hague*, 1804, 5 Esp. 134; *Allen v. Denstone*, 1839, 8 C. & P. 760; *Tunley v. Evans*, 1845, 14 L. J. Q. B. 116; 2 D. & L. 747; 69 R. R. 877; *Wagstaff v. Wilson*, 1832, 4 B. & Ad. 339; *Snowball v. Goodriche*, 1833, 4 B. & Ad. 541.

(*r*) Illustrations 9 and 10. *Schumack v. Lock*, 1825, 10 Moore, 39; *Garth v. Howard*, 1832, 1 L. J. C. P. 129; 1 M. & Scott, 628; 34 R. R. 753; *Whitehouse v. Abberley*, 1845, 1 C. & K. 642; *Olding v. Smith*, 1852, 16 Jur. 497; *Meredith v. Footner*, 1843, 12 L. J. Ex. 183; 11 M. & W. 202; 63 R. R. 581.

(*s*) Illustration 8.

Held, that the statement was admissible in evidence as an admission by the railway company (*t*).

2. In an action against a railway company for not delivering certain cattle within a reasonable time, it appeared that a servant of the company, a week after the alleged cause of action arose, in answer to the question why he had not sent on the cattle, said that he had forgotten them. Held, that this admission was not admissible in evidence against the company, because it concerned a bygone transaction (*u*).

3. A shipmaster contracted by charter-party to carry certain goods. In an action against the shipowners for not carrying and delivering certain of the goods, letters written by the master to the plaintiff were admitted in evidence to show that the goods had been duly received (*x*). So, where an agent, who was employed to buy certain goods, acknowledged having received them, it was held that the acknowledgment was evidence of a delivery to the principal (*y*).

4. An agent is employed to pay workmen for work done. A promise by him to pay is an admission which can be used against the principal as evidence that the money is due, and if the promise be in writing and signed by the agent, it interrupts the operation in the principal's favour of the Statute of Limitations (*z*).

5. A wife carries on a business on her husband's behalf, and purchases all the goods required for such business. An admission by her as to the state of accounts between her

(*t*) *Kirkstall Brewery v. Furness Rail.*, 1874, L. R. 9 Q. B. 468; 43 L. J. Q. B. 142. See also *Ruddy v. Mid. G. W. Rail.*, 1880, 8 L. R. Ir. 224.

(*u*) *G. W. Rail. v. Willis*, 1865, 34 L. J. C. P. 195; 18 C. B. N. S. 748; *Johnson v. Lindsay*, 1889, 53 J. P. 599.

(*x*) *British Columbia, &c. Co. v. Nettleship*, 1868, L. R. 3 C. P. 330; 37 L. J. C. P. 235.

(*y*) *Biggs v. Lawrence*, 1789, 3 T. R. 454; 1 R. R. 740.

(*z*) *Burt v. Palmer*, 1804, 5 Esp. 145; 9 Geo. IV. c. 14, s. 6; 19 & 20 Vict. c. 97, s. 13.

husband and the persons supplying the goods is evidence against the husband, and a written and signed promise by her to pay interrupts the operation of the Statute of Limitations (*a*). So, a part-payment by an agent, in the course of his employment, of a debt owing by the principal, interrupts the operation of the Statute of Limitations (*b*).

6. A solicitor or counsel is retained to conduct an action. Statements made by him in the conduct and for the purposes of the action are evidence against the client (*c*). But statements made by him in casual conversation, and not in the course and for the purposes of the action, are not (*d*). So, statements made by a solicitor for the purposes of one action cannot be used as evidence in another action which the solicitor is conducting on behalf of the same client (*e*).

7. An officer or member of a corporation or company answers interrogatories on its behalf. The answers may be read as an admission by the corporation or company (*f*).

8. A. refers B. to C., for information concerning a par-

(*a*) *Anderson v. Sanderson*, 1817, 2 Stark. 204; 19 R. R. 703; *Palethorp v. Furnish*, 1796, 2 Esp. 511, n.; *Emerson v. Blonden*, 1794, 1 Esp. 142; 5 R. R. 725. Comp. *Meredith v. Footner*, 1843, 11 M. & W. 202; 12 L. J. Ex. 183; 63 R. R. 581.

(*b*) See notes (*z*) and (*a*), *supra*. *Jones v. Hughes*, 1850, 5 Ex. 104; 19 L. J. Ex. 200; 82 R. R. 594; *Re Hale*, *Lilley v. Foad*, (1899) 2 Ch. 107; 68 L. J. Ch. 517, C. A. Comp. *Watson v. Woodman*, 1875, L. R. 20 Eq. 721; 45 L. J. Ch. 57.

(*c*) *Marshall v. Cliff*, 1815, 4 Camp. 133; *Haller v. Worman*, 1861, 3 L. T. 741.

(*d*) *Petch v. Lyon*, 1846, 9 Q. B. 147; 15 L. J. Q. B. 393; 72 R. R. 205; *Parkins v. Hawkshaw*, 1814, 2 Stark. 239; 19 R. R. 711; *Wilson v. Turner*, 1808, 1 Taunt. 398; 9 R. R. 797; *Young v. Wright*, 1807, 1 Camp. 140; *Richardson v. Peto*, 1840, 1 M. & G. 896.

(*e*) *Blackstone v. Wilson*, 1857, 26 L. J. Ex. 229; 112 R. R. 922.

(*f*) *Welsbach, &c. Co. v. New Sunlight Co.*, (1900) 2 Ch. 1; 69 L. J. Ch. 546, C. A.

ticular matter. Statements made by C. to B. respecting such matter are evidence against A. (*g*).

9. The secretary of a tramway company represented that certain money was due from the company. Held, that the company was not estopped by such representation from saying that the money was not due, because it was not within the scope of the secretary's employment to make any such representation (*h*).

10. An agent was authorized to offer part of a debt in discharge of the whole. The creditor refused payment on those terms, and the agent then, without the principal's authority, paid the amount in part discharge of the debt. Held, that such part-payment did not take the debt out of the operation of the Statute of Limitations (*i*).

11. The chairman of a company makes a statement at a meeting of shareholders. The statement cannot be put in evidence against the company by any third person (*k*).

12. An agent writes letters to his principal containing an account of transactions performed on his behalf. The letters cannot be put in evidence against the principal by third persons (*l*).

### Article 109.

#### WHEN NOTICE TO AGENT EQUIVALENT TO NOTICE TO PRINCIPAL.

Where any fact or circumstance, material to any transaction, business, or matter in respect of which an agent is employed, comes to his knowledge in

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(*g*) *Williams v. Innes*, 1808, 1 Camp. 364; 10 R. R. 702; *Hood v. Reeve*, 1828, 3 C. & P. 532; *Burt v. Palmer*, 1804, 5 Esp. 145.

(*h*) *Barnett v. South London Tram Co.*, 1887, 18 Q. B. D. 815, C. A.

(*i*) *Linsell v. Bonsor*, 1835, 2 Bing. N. C. 241.

(*k*) *Re Devala Provident, &c. Co., Ex p. Abbott*, 1883, 22 Ch. Div. 593; 52 L. J. Ch. 434.

(*l*) *Langhorn v. Allnutt*, 1812, 4 Taunt. 511; 13 R. R. 663.

the course of such employment, and is of such a nature that it is his duty to communicate it to his principal, the principal is deemed to have notice thereof as from the time when he would have received such notice if the agent had performed his duty, and taken such steps to communicate the fact or circumstance as he ought reasonably to have taken (*m*). Provided that—

- (a) Where an agent is party or privy to the commission of a fraud or misfeasance upon or against his principal, his knowledge of such fraud or misfeasance, and of the facts and circumstances connected therewith, is not imputed to the principal (*n*); and
- (b) Where the person seeking to charge the principal with notice knew that the agent intended to conceal his knowledge from the principal, such knowledge is not imputed to the principal (*o*).

Knowledge acquired by an agent otherwise than in the course of his employment on the principal's

(*m*) Illustrations 1 to 9. *Attwood v. Small*, 1838, 6 C. & F. 232; 49 R. R. 115, H. L.; *Re Halifax Sugar Co.*, 1891, 7 T. L. R. 293, C. A.; *Ex p. Agra Bank*, *Re Worcester*, 1868, L. R. 3 Ch. 555; 37 L. J. Bk. 23; *Graves v. Legg*, 1857, 2 H. & N. 210; 26 L. J. Ex. 316; 115 R. R. 497, Ex. Ch.; *Gosling's case*, 1829, 3 Sim. 301; *Rowland v. Chapman*, 1901, 17 T. L. R. 669; *Rainford v. Keith*, (1905) 2 Ch. 147; 74 L. J. Ch. 531, C. A.; *Bunbury v. Hibernian Bank*, (1908) 1 Ir. R. 261.

(*n*) Illustrations 10 and 11. *Re Hampshire Land Co.*, (1896) 2 Ch. 743; 65 L. J. Ch. 860.

(*o*) *Sharpe v. Foy*, 1868, 17 W. R. 65, Ch. App.

behalf (*p*), or of any fact or circumstance which is not material to the business in respect of which he is employed (*q*), is not imputed to the principal.

### *Illustrations.*

1. An agent of an assurance company negotiated a contract of insurance with a man who had lost the sight of an eye. Held, that the company must be deemed to have had notice that the assured had lost the sight of an eye, and that it could not avoid the contract on the ground of non-disclosure by him of that fact (*r*).

2. A broker bought goods from a factor, knowing him to be selling on behalf of a principal. Held, that the principal for whom the broker acted must be deemed to have had notice that the factor was not selling his own goods (*s*).

3. A ship was driven on a rock and damaged. The master afterwards wrote a letter to the owner, but did not communicate the fact of the ship having been damaged, and, subsequent to the receipt of the letter, the owner insured the ship. Held, that the master ought to have communicated the fact, and that therefore the owner must be deemed to have had a knowledge of it at the time of the insurance (*t*).

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(*p*) Illustration 12. *Wythes v. Labouchere*, 1859, 3 De G. & J. 593; *Re Marseilles Rail., Ex p. Crédit Foncier*, 1872, L. R. 7 Ch. 161; 41 L. J. Ch. 345; *Welsbach, & Co. v. New Sunlight Co.*, (1900) 2 Ch. 1; 69 L. J. Ch. 546, C. A.; *Wells v. Smith*, (1914) 3 K. B. 722; *Taylor v. Yorkshire Ins. Co.*, (1913) 2 Ir. R. 1.

(*q*) Illustrations 13 to 17. *Wilde v. Gibson*, 1848, 1 H. L. Cas. 605; 73 R. R. 191, H. L.

(*r*) *Bawden v. London, & Co. Ass. Co.*, (1892) 2 Q. B. 534, C. A. And see *Holdsworth v. Lancashire and Yorkshire Insurance Co.*, 1907, 23 T. L. R. 521; *Thornton-Smith v. Motor Union Ins. Co.*, 1913, 30 T. L. R. 139; *Golding v. Royal London, & Co. Ins. Co.*, 1914, 30 T. L. R. 350; *Ayrey v. British Legal, & Co. Ass.*, (1918) 1 K. B. 136; 87 L. J. K. B. 513; and Article 98, Illustration 8.

(*s*) *Dresser v. Norwood*, 1864, 17 C. B. N. S. 466; 34 L. J. C. P. 48, Ex. Ch.

(*t*) *Gladstone v. King*, 1813, 1 M. & S. 35; 14 R. R. 392.

So, where an agent shipped goods, and, having heard of a loss, purposely refrained from telegraphing to the principal because he thought it might prevent him from insuring, it was held that it was his duty to have telegraphed, and that an insurance effected by the principal after the time when he would have received the telegram was void on the ground of non-disclosure of material facts (*u*).

4. A broker was employed to effect an insurance, but did not effect it. Subsequently, another broker effected a policy in respect of the same risk, on behalf of the same principal. It was sought to avoid the policy on the ground of the non-disclosure of a material fact which had come to the knowledge of the first-mentioned broker in the course of his employment, but which he had not communicated to the principal, and which was not known, either to the principal or to the broker who effected the policy. Held, that the policy was valid (*x*). It is not the duty of a broker who is employed to effect an insurance to communicate material facts coming to his knowledge to the principal, but only to the insurer (*x*).

5. A. has a dog, which is kept at his stables under the care and control of his coachman. The coachman's knowledge of the ferocity of the dog is equivalent to A.'s knowledge thereof (*y*). So, where the wife of A. occasionally attended to his business, which was carried on upon premises where a dog was kept, and B. made a formal complaint to her, for the purpose of its being communicated to A., that the dog had bitten B.'s nephew, it was held that that was some evidence of scienter on the part of A. (*z*). But the mere fact that a servant knows a dog to be dangerous is no evidence of scienter on the part of the master, where the servant has

(*u*) *Proudfoot v. Montefiori*, 1867, L. R. 2 Q. B. 511; 36 L. J. Q. B. 225; *Fitzherbert v. Mather*, 1785, 1 T. R. 12; 1 R. R. 134.

(*x*) *Blackburn v. Vigors*, 1887, 12 A. C. 531; 57 L. J. Q. B. 114, H. L.

(*y*) *Baldwin v. Casella*, 1872, L. R. 7 Ex. 325; 41 L. J. Ex. 167.

(*z*) *Gladman v. Johnson*, 1867, 36 L. J. C. P. 153; *Plimmer v. Sells*, 1834, 3 N. & M. 422.



nothing to do with the care or control of the dog, and has not the control of the premises or place where it is kept (a).

6. Notice of withdrawal of an application for shares was given during business hours to a clerk at the registered office of the company, the clerk stating that the secretary was out. Held, that it operated as notice to the company (b).

7. A notice to quit is served at the house of a tenant upon a servant whose duty it is to deliver it to the tenant. That is good service on the tenant, though the servant does not deliver the notice to him (c).

8. The solicitor of a judgment creditor, having issued execution against the debtor, instructed A., a solicitor at the place where the execution was levied, to take an assignment of the goods seized from the sheriff. A. did so, after having received notice of an act of bankruptcy by the debtor. Held, that the creditor must be deemed to have taken the assignment with notice of the act of bankruptcy (d). So, if a solicitor, with the consent of his client, puts his managing clerk in his place to conduct and manage the matter, notice of an act of bankruptcy to the clerk operates as notice to the solicitor and to the client (e).

9. A solicitor induced a client to advance money on mortgage, and afterwards induced another client to advance money on the same land. Held, that the last-mentioned

(a) *Stiles v. Cardiff Nav. Co.*, 1864, 33 L. J. Q. B. 310; *Cleverton v. Uffernel*, 1887, 3 T. L. R. 509; *Colgett v. Norrish*, 1886, 2 T. L. R. 471, C. A.

(b) *Truman's case*, (1894) 3 Ch. 272; 63 L. J. Ch. 635.

(c) *Tanham v. Nicholson*, 1872, L. R. 5 H. L. 561, H. L.

(d) *Brewin v. Briscoe*, 1859, 28 L. J. Q. B. 329; 2 El. & El. 116; 119 R. R. 650; *Rothwell v. Timbrell*, 1842, 1 Dowl. N. S. 778.

(e) *Re Ashton, Ex p. McGowan*, 1891, 64 L. T. 28; *Pike v. Stephens*, 1848, 12 Q. B. 465; 17 L. J. Q. B. 282; 76 R. R. 316; *Pennell v. Stephens*, 1849, 18 L. J. C. P. 291; 7 C. B. 987; 78 R. R. 893.

client must be deemed to have had notice of the prior mortgage (*f*).

10. A solicitor in the course of a transaction on his client's behalf, became a party to a fraud on the client. Held, that that did not operate as notice to the client of the fraudulent act, because no person would be likely to disclose his own fraud to the person defrauded (*g*). So, where the directors of a company took part in a misfeasance against the company, it was held that their knowledge did not operate as notice to the company of the misfeasance (*h*). But the mere fact that the agent has an interest in concealing facts from his principal is not sufficient to prevent his knowledge of those facts from being imputed to the principal, where it is his duty to communicate them (*i*).

11. A solicitor sells or mortgages property, and himself draws the purchase or mortgage deed and carries the transaction through on behalf and with the consent of the purchaser or mortgagee. The purchaser or mortgagee is deemed to have notice of all incumbrances of which the solicitor has knowledge, even if the solicitor fraudulently conceals such incumbrances (*k*).

(*f*) *Rolland v. Hart*, 1871, L. R. 6 Ch. 678; 40 L. J. Ch. 701. And see *Le Neve v. Le Neve*, 1747, 1 Ves. 64.

(*g*) *Cave v. Cave*, *Chaplin v. Cave*, 1880, 15 Ch. D. 639; 49 L. J. Ch. 505; *Kennedy v. Green*, 1834, 3 Myl. & K. 699; 41 R. R. 176; *Waldy v. Gray*, 1875, L. R. 20 Eq. 238; 44 L. J. Ch. 394. Comp. Illustration 11.

(*h*) *Re Fitzroy Bessemer Steel Co.*, 1884, 50 L. T. 144.

(*i*) *Thompson v. Curtwright*, 1863, 33 Beav. 178; *Rolland v. Hart*, *supra*, note (*f*); *Bradley v. Riches*, 1878, 9 Ch. Div. 189; 47 L. J. Ch. 811; *Dixon v. Winch*, (1900) 1 Ch. 736; 69 L. J. Ch. 465, C. A. See Illustration 11.

(*k*) *Atterbury v. Wallis*, 1856, 25 L. J. Ch. 792; *Re Weir*, 1888, 58 L. T. 792; *Boursot v. Savage*, 1866, L. R. 2 Eq. 134; 35 L. J. Ch. 627; *Dryden v. Frost*, 1837, 8 L. J. Ch. 235; 3 Myl. & C. 670; 45 R. R. 344; *Sheldon v. Cox*, 1764, 2 Eden, 224; *Dixon v. Winch*, *supra*. Comp. *Espin v. Pemberton*, 1859, 3 De G. & J. 547; *Hewitt v. Loose-*

12. The secretary or a director of a company, in his private capacity, and when he is not transacting the business of the company, casually acquires knowledge of certain facts concerning the company's business. That does not operate as notice to the company of such facts (*l*). So, if a person is secretary of two companies, knowledge acquired by him as secretary of one of the companies will not be imputed to the other company, unless the knowledge was acquired under such circumstances as to make it his duty to communicate it to such other company (*m*).

13. A solicitor who was employed to transfer a mortgage knew that there were incumbrances on the property subsequent to such mortgage. Held, that his knowledge did not operate as notice of the incumbrances to the transferee, because the incumbrances were not material to the transfer, for which alone the solicitor was employed (*n*). As a general rule, in order that the principal may be deemed to have notice of facts coming to the knowledge of his agent, the facts must come to the agent's knowledge in the course of the transaction with respect to which the question of notice arises (*o*), or, at all events, must be fresh in his memory at the time of such transaction (*p*).

more, 1851, 21 L. J. Ch. 69; 9 Hare, 449; 89 R. R. 526. Illustration 10.

(*l*) *Société Générale de Paris v. Tramways Union Co.*, 1884, 14 Q. B. D. 424; 54 L. J. Q. B. 177, C. A.; *Ex p. Boulton, Re Sketchley*, 1857, 26 L. J. Bk. 45; 1 De G. & J. 163; 118 R. R. 74; *Ex p. Carbis*, 1834, 4 Dea. & Ch. 354; *Re Payne, Young v. Payne*, (1904) 2 Ch. 608; 73 L. J. Ch. 849, C. A.

(*m*) *Re Fenwick, Deep Sea Fishery Co.'s Claim*, (1902) 1 Ch. 507; 71 L. J. Ch. 321.

(*n*) *Wyllie v. Pollen*, 1863, 32 L. J. Ch. 782; *Brittain v. Brown*, 1871, 24 L. T. 504.

(*o*) *Hiern v. Mill*, 1806, 13 Ves. 120; 9 R. R. 149; *Wyllie v. Pollen*, *supra*.

(*p*) *Fuller v. Benett*, 1842, 12 L. J. Ch. 355; 2 Hare, 394; 62 R. R. 152.

14. Directors of a banking company, who had no voice in the management of the accounts, acquired a knowledge of certain circumstances relating to the accounts. Held, that that did not operate as notice of such circumstances to the company (*q*).

15. An underwriter sought to avoid a policy on the ground of the non-disclosure of a material fact. The fact had been disclosed to his solicitor, but had not been communicated to him. Held, that he was not bound by the disclosure to his solicitor, it not being in the ordinary course of a solicitor's employment to receive mercantile notices as to mercantile transactions (*r*). So, the knowledge of Lloyd's agents is not imputable to individual members of Lloyd's (*s*).

16. Notice of a bankruptcy petition against an execution debtor is given to the man left in possession by the sheriff. That does not operate as notice to the sheriff, because the man in possession is only his agent for the purpose of levying, selling the goods, and handing over the proceeds (*t*).

17. Notice of an incumbrance was given to a solicitor who had been employed by certain trustees in all matters relating to the trust in which professional assistance was required, but who had not been authorized to receive notices on their behalf, and the solicitor wrote accepting the notice on behalf of the trustees. Held, that the notice to the solicitor did not operate as notice to the trustees, solicitors not being, as such, standing agents of their clients to receive notices on their behalf (*u*).

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(*q*) *Powles v. Page*, 1846, 3 C. B. 16; 71 R. R. 262; *Re Carew's Estate Act*, 1862, 31 Beav. 39.

(*r*) *Tate v. Hyslop*, 1885, 15 Q. B. D. 368; 54 L. J. Q. B. 592, C. A.

(*s*) *Wilson v. Salamandra Ass. Co.*, 1903, 88 L. T. 96.

(*t*) *Ex p. Warren*, 1885, 1 T. L. R. 430, C. A.

(*u*) *Saffron Walden Building Society v. Rayner*, 1880, 14 Ch. Div. 406; 49 L. J. Ch. 465, C. A.

*Notice to Purchasers for Value.*

The third section of the Conveyancing Act, 1882 (*x*), provides that a purchaser of property for valuable consideration shall not be prejudicially affected by notice of any instrument, fact, or thing, unless it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such (*y*), or of his solicitor, or other agent, as such (*y*), or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent (*z*).

Sect. 5.—*Rights of principal in respect of property intrusted to agent.*

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**Article 110.**

**RIGHT TO FOLLOW PROPERTY INTO HANDS OF THIRD PERSONS.**

Subject to the provisions of Articles 80, 82 to 86, and 88, where an agent disposes of the money or property of his principal in a manner not authorised by him, the principal is entitled, as against the agent and third persons, to recover such money or property, wheresoever it may be found (*a*).

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(*x*) 45 & 46 Vict. c. 39.

(*y*) *I.e.* as his agent, see *Re Cousin's Trusts*, 1886, 31 Ch. Div. 671; 55 L. J. Ch. 662; *Meyer v. Charters*, 1918, 34 T. L. R. 589.

(*z*) See *Maxfield v. Burton*, 1873, L. R. 17 Eq. 15; 43 L. J. Ch. 46.

(*a*) Illustrations 1 to 3. *Lang v. Smyth*, 1831, 7 Bing. 284; 9 L. J.

*Illustrations.*

1. A. authorizes B., a stockbroker, to sell certain shares transferable only by deed, and intrusts him with the certificates and a blank transfer of the shares for that purpose. B. deposits the blank transfer and certificates with his banker as security for an advance to himself. The banker has no title to the shares as against A. (*b*).

2. An agent fraudulently applies moneys of his principal in the purchase of overdue bills, which he sells to a company. The company has no title to the bills as against the principal, overdue bills not being negotiable instruments (*c*).

3. A., a solicitor, received rents as agent for his client, and paid them into his own bank to an account headed with the name of the estate. Subsequently, A.'s private account being overdrawn, he transferred to it the balance of the estate account. Held, that the banker, being aware that A. was committing a breach of trust, was liable to repay to the principal the amount so transferred (*d*). Otherwise, if the banker had not had notice that the moneys were trust moneys (*e*), or had not known that a breach of trust was being committed (*f*).

C. P. 91; 33 R. R. 462; *Rimmer v. Webster*, (1902) 2 Ch. 163; 71 L. J. Ch. 561; *Farquharson v. King*, (1902) A. C. 325; 71 L. J. K. B. 667, II. L.; *Gompertz v. Cook*, 1904, 20 T. L. R. 106. See also Article 85, Illustrations 4 to 7; Article 87, Illustrations 1, and 3 to 7.

(*b*) *For v. Martin*, 1895, 64 L. J. Ch. 473; *Colonial Bank v. Cady*, 1890, 15 A. C. 267; 60 L. J. Ch. 131, H. L.; *Hutchison v. Colorado Mining Co.*, *Humill v. Lilley*, 1887, 3 T. L. R. 265, C. A.; *France v. Clark*, 1884, 26 Ch. D. 257; 53 L. J. Ch. 585, C. A.; *Tayler v. Gt. Indian Rail.*, 1859, 28 L. J. Ch. 709; 4 De G. & J. 559.

(*c*) *Re European Bank, Ex p. Oriental Bank*, 1870, L. R. 5 Ch. 358; 39 L. J. Ch. 588.

(*d*) *Bodenham v. Hoskyns*, 1852, 21 L. J. Ch. 864; 2 De G. M. & G. 903; 95 R. R. 363.

(*e*) *Union Bank of Australia v. Murray-Aynsley*, (1898) A. C. 693, P. C.

(*f*) *Shields v. Bank of Ireland*, (1901) 1 Ir. R. 222; *Bank of New*

## Article 111.

## RIGHTS AS AGAINST AGENT'S TRUSTEE IN BANKRUPTCY.

On the bankruptcy of an agent, the principal is entitled, as against the trustee in bankruptcy and creditors of the bankrupt, to all moneys and property held by the bankrupt, and all outstanding debts due to the bankrupt, as his agent, subject to any lien of the bankrupt thereon (*g*). Provided that this principle does not extend to money or goods, or debts due or growing due to the bankrupt in the course of his trade or business, which are, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt in his trade or business (*h*), by the consent and permission of the true owner (*i*), under such circumstances that the bankrupt is the reputed owner thereof (*k*).

*South Wales v. Goulburn Valley Butter Factory*, (1902) A. C. 543; 71 L. J. P. C. 112. And see Article 135.

(*g*) Illustrations 1 to 7. *Ex p. Kelly*, 1879, 11 Ch. D. 306; 48 L. J. Bk. 65; *Farley v. Turner*, 1857, 26 L. J. Ch. 710; 112 R. R. 442; *Re Cotton, Ex p. Cooke*, 1913, 57 Sol. Jo. 174. As to the right to books, &c. relating to the principal's affairs, see *Re Burnand, Ex p. Wilson*, (1904) 2 K. B. 68; 73 L. J. K. B. 413, C. A.

(*h*) See *Re Jenkinson, Ex p. Nottingham Bank*, 1885, 15 Q. B. D. 441; 54 L. J. Q. B. 601; *Re Pryce, Ex p. Rensburg*, 1877, 4 Ch. D. 685; *Brewin v. Short*, 1855, 24 L. J. Q. B. 297; 5 E. & B. 227; 103 R. R. 450.

(*i*) See *Ex p. Carlrow*, 1834, 2 Mont. & A. 39; *Smith v. Topping*, 1833, 3 L. J. K. B. 47; 5 B. & Ad. 674; 39 R. R. 616; *Ex p. Ward, Re Couston*, 1873, L. R. 8 Ch. 144; 42 L. J. Bk. 17.

(*k*) Bankruptcy Act 1914 (4 & 5 Geo. 5, c. 59), s. 38. See *Re Fawcus, Ex p. Buck*, 1876, 3 Ch. Div. 795. And see Illustrations 6, 7 and 10.

Where an agent misapplies the money or property of his principal, the principal is entitled, as against the agent and his trustee in bankruptcy and creditors, to the proceeds of such money or property, of whatsoever nature they may be, provided that they can be clearly traced (*l*).

Where an agent mixes the money or property of his principal with his own, the principal is entitled as against the agent and his trustee in bankruptcy and creditors, to a first charge on the mixed fund or property, or on the proceeds thereof, provided that they can be clearly traced (*m*).

#### *Illustrations.*

1. Money is paid to a broker by his principal for application in a particular way. The broker pays the money into his own account at a bank, and becomes bankrupt before applying it as directed. The principal is entitled to the money, as against the broker's trustee in bankruptcy (*n*). If, in such a case, the agent has drawn on the account, the principal has a charge on the balance in the banker's hands, the amounts so drawn being deemed to be drawn out of the agent's own moneys, whenever they were paid in (*o*). Where

(*l*) Illustrations 8 to 10. *Hopper v. Congers*, 1866, L. R. 2 Eq. 549.

(*m*) Illustrations 1, 11 and 12. *Re Murray, Dickson v. Murray*, 1887, 57 L. T. 223. See also *Re Burge, Ex p. Skyrme*, (1912) 1 K. B. 393; 81 L. J. K. B. 721.

(*n*) *Ex p. Cooke, Re Struchan*, 1876, 4 Ch. D. 123; 46 L. J. Bk. 52, C. A.; *Hancock v. Smith*, 1889, 41 Ch. D. 456; 58 L. J. Ch. 725, C. A.; *Re Wreford, Carmichael v. Rudkins*, 1897, 13 T. L. R. 153. Comp. *Re Hallett, Ex p. Blane*, (1894) 2 Q. B. 237; 63 L. J. Q. B. 573, C. A.; *Ex p. Hardcastle, Re Mawson*, 1881, 44 L. T. 523; *King v. Hutton*, (1900) 2 Q. B. 504; 69 L. J. Q. B. 786, C. A.; *Wilsons & Furness-Leyland Line v. British & Continental Shipping Co.*, 1907, 23 T. L. R. 397.

(*o*) *Re Hallett's Estate. Knatchbull v. Hallett*, 1880, 13 Ch. Div. 696;



the moneys of several principals have been paid into the account, their charges have priority in the inverse order of the payments, the balance being deemed to consist of the trust moneys most recently paid in (*p*).

2. An agent becomes bankrupt, it being a matter of notoriety that he acts as an agent. Goods in his hands for sale (*q*), and unmatured bills and notes received by him as the price of goods sold (*r*), must, subject to his lien, be returned to the principal, and may be recovered by him from the trustee in bankruptcy. The price of goods already sold may, subject to the agent's lien, be recovered by the principal from the purchaser (*s*), and if received by the trustee in bankruptcy, may be recovered from him by the principal as money received to his use (*s*).

3. Bills of exchange are paid into a bank, to be collected as they fall due, and the proceeds credited to the account of the customer. The banker becomes bankrupt. The customer is entitled, as against the trustee in bankruptcy, to any of the bills the proceeds of which have not been received by the banker before the bankruptcy, subject to any lien the banker may have thereon (*t*); and if the trustee in bankruptcy

49 L. J. Ch. 415, C. A.; *Spartali v. Crédit Lyonnais*, 1886, 2 T. L. R. 178, C. A.; *Re Wreford, Carmichael v. Rudkins*, 1897, 13 T. L. R. 153. And see *Société Coloniale Anversoise v. London & Brazilian Bank*, (1911) 2 K. B. 1024; 80 L. J. K. B. 1361, C. A.

(*p*) *Re Stenning*, (1895) 2 Ch. 433.

(*q*) *Scott v. Surman*, 1742, Willes, 400; *Ex p. Boden, Re Wood*, 1873, 28 L. T. 174; *Stafford v. Clark*, 1823, 1 C. & P. 24; *Ex p. Dumas*, 1754, 1 Atk. 231; *Godfrey v. Furzo*, 1733, 3 P. W. 186; *Ex p. Wucherer*, 1832, 2 Dea. & Ch. 37; *Ex p. Moldaut*, 1833, 3 Dea. & Ch. 351; *Re Kullberg*, 1863, 9 L. T. 460.

(*r*) *Scott v. Surman*, 1742, Willes, 400; *Whitecomb v. Jacob*, 1 Salk. 160.

(*s*) *Scott v. Surman, supra*; *Ex p. Boden*, 1873, 28 L. T. 174; *Ex p. Carlou*, 1834, 2 Mont. & A. 39; *Burdett v. Willett*, 1708, 2 Vern. 638; *Ex p. Moldaut*, 1833, 3 Dea. & Ch. 351.

(*t*) *Giles v. Perkins*, 1807, 9 East, 12; *Thompson v. Giles*, 1824, 3 D. & R. 733; 26 R. R. 392; *Ex p. Benson*, 1832, 1 Dea. & Ch. 435;

collects any of the bills, he is liable to the customer for the proceeds or for the value thereof, at the option of the customer (*u*). Otherwise, where the banker discounts the bills (*x*), or there is an agreement with the customer that they shall become the property of the banker (*x*). Such an agreement is not, however, to be inferred merely because it is the custom of the banker to credit the amount of the bills as cash immediately they are paid in, and charge interest for the unexpired period (*x*).

4. Bills are remitted to an agent for a particular purpose. They must be returned to the remitter, if the agent becomes bankrupt before applying them to such purpose (*y*).

5. A foreign merchant remitted bills to a factor in London, with instructions to sell them. The factor sold and indorsed them in his own name, and became bankrupt before receiving the price. Held, that the principal was entitled to the proceeds, as against the trustee in bankruptcy (*z*).

6. Books are left with a publisher for sale in the course of his trade. The books do not pass to his trustee in bank-

*Ex p. Armitstead*, 1828, 2 G. & J. 371; *Ex p. Sollers*, 1811, 18 Ves. 229; *Ex p. Rowton*, 1810, 17 Ves. 426. As to instruments payable on demand, see *Re Mills*, 1893, 10 M. B. R. 193.

(*u*) *Tenant v. Strachan*, 1829, 4 C. & P. 31; *Giles v. Perkins*, *supra*; *Thompson v. Giles*, *supra*; *Ex p. Bond*, 1840, 1 M. D. & De G. 10; *Ex p. Froggatt*, 1843, 3 M. D. & De G. 322; *Ex p. Edwards*, 1842, 2 M. D. & De G. 625.

(*x*) *Giles v. Perkins*, *supra*; *Thompson v. Giles*, *supra*; *Re Gothenburg Commercial Co.*, 1881, 44 L. T. 166, C. A.; *Re Broad*, *Ex p. Neck*, 1884, 13 Q. B. D. 740; 54 L. J. Q. B. 79, C. A.; *Ex p. Barkworth*, *Re Harrison*, 1858, 27 L. J. Bk. 5; 2 De G. & J. 194; 119 R. R. 84; *Curstairs v. Bates*, 1812, 3 Camp. 301; *Dawson v. Isle*, (1906) 1 Ch. 633; 75 L. J. Ch. 338.

(*y*) *Ex p. Oursell*, 1756, Ambl. 297; *Ex p. Smith*, 1819, Buck. 355; *Ex p. Sayers*, 1800, 5 Ves. 169; 5 R. R. 17; *Jombart v. Woollett*, 1837, 6 L. J. Ch. 211; 2 Myl. & C. 389; 45 R. R. 101; *Parke v. Eliason*, 1801, 1 East, 544; *Zinck v. Walker*, 1777, W. Bl. 1154; *Tooke v. Hollingworth*, 1793, 5 T. R. 215; 2 R. R. 573.

(*z*) *Ex p. Pauli*, *Re Trye*, 1838, 3 Dea. 169.

ruptey (*a*). So, where an agent was described, on a brass plate at his place of business and on his invoices, as a merchant and manufacturer's agent, that was held to be sufficient notice of the agency to exclude the operation of the reputed ownership clause of the Bankruptcy Act, and the trustee in bankruptcy was ordered to deliver up to the manufacturers goods of theirs in the hands of the agent, and to pay over to them the proceeds of goods which had been sold on their behalf (*b*).

7. Books are deposited with a bookseller for sale on commission, and are kept by him as part of his general stock. It is notorious in the trade that it is customary for booksellers to act as agents for the sale of books on commission. The books are not in his reputed ownership, and on his bankruptcy must be delivered up to the principal (*c*). The reputed ownership clause only applies where the moneys or goods are in the possession of, or the debts are owing to, the bankrupt under such circumstances that, in the ordinary course of his business, he would obtain delusive credit thereby (*d*).

8. A broker misapplied his principal's money by purchasing stock and bullion, and absconded. He was adjudicated bankrupt on the same day upon which he received the money and so misapplied it. On being arrested he surrendered the securities for the stock and bullion to the principal.

(*a*) *Ex p. Greenwood, Re Thickbroom*, 1862, 6 L. T. 558.

(*b*) *Ex p. Bright, Re Smith*, 1879, 10 Ch. Div. 566; 48 L. J. Bk. 81, C. A.

(*c*) *Whitfield v. Brand*, 1847, 16 M. & W. 282; 73 R. R. 502; *Ex p. Poppleton*, 1891, 63 L. T. 839 (safes sent to an ironmonger on sale or return); *Ex p. Wingfield, Re Florence*, 1879, 10 Ch. D. 591, C. A. (horses sent to a horsedealer on sale or return).

(*d*) *Colonial Bank v. Whinney*, 1886, 11 A. C. 426; 56 L. J. Ch. 43, H. L.; *Re Watson, Ex p. Atkin*, (1904) 2 K. B. 753; 73 L. J. K. B. 854, C. A.

Held, that the principal was entitled to retain the securities as against the trustee in bankruptcy (*e*).

9. A factor, who was intrusted with money to buy indigo, applied it partly to the reduction of a mortgage debt and partly in investments which resulted in profits, and subsequently became bankrupt. Held, that the principal was entitled to the surplus produced by a sale of the mortgaged property, and to the profits realized by the investments, as the proceeds of the money misapplied by the factor, so far as it was possible to trace them (*f*).

10. Malting agents sent in to their principal fictitious accounts of barley alleged to have been bought on his account, and misapplied the money. They subsequently absconded, leaving barley and malt on their premises of less value than the amount misapplied, and became bankrupt. The principal seized the malt and barley. Held, that he was entitled to hold it as against the trustee in bankruptcy. It is notorious that malting agents are, in many instances, not the owners of barley and malt on the malting premises, and it was, therefore, not in the order and disposition of the agents as reputed owners; and though much of it was bought with their own money, they were estopped, by their representation that they were buying it with the money intrusted to them by the principal, from saying so, and the trustee in bankruptcy was, in this respect, in no better position (*g*).

11. An agent, who was intrusted with bills to get discounted, mixed them with his own property, absconded, and became bankrupt. He was arrested with money in his possession which was clearly shown to be the produce of

(*e*) *Taylor v. Plumer*, 1815, 3 M. & S. 562; 16 R. R. 361; *Re Hulton, Ex p. Manchester Bank*, 1891, 39 W. R. 303. And see *Re Dodds, Ex p. Brown*, 1891, 60 L. J. Q. B. 599.

(*f*) *Ex p. Brooke, Re Hammond*, 1869, 20 L. T. 547.

(*g*) *Harris v. Truman*, 1882, 9 Q. B. D. 264; 51 L. J. Q. B. 338, C. A. And see *Middleton v. Pollock, Ex p. Wetherall*, 1876, 4 Ch. D. 49; 46 L. J. Ch. 39.

portions of the mixed property. Held, that the principal was entitled, in preference to the other creditors, to a first charge on such money for the amount of the bills (*h*).

12. An agent, who was employed to sell certain goods, mixed them with goods of his own, and consigned the whole of the goods together to a factor for sale, representing to his principal that he had sold his goods, and debiting himself with the amount of the supposed prices. The agent having become bankrupt, the principal was held entitled to have the proceeds of the mixed property marshalled, so as to throw advances made by the factor, as far as possible, on the agent's own goods (*i*).

#### Article 112.

#### PRIVILEGE FROM DISTRESS OF GOODS AND CHATTELS IN HANDS OF AGENT.

Where goods or chattels are intrusted to an agent, who carries on a trade or business in which the public are invited to intrust their goods or chattels to him, for the purpose of being sold or otherwise dealt with in the way of such trade or business, the goods or chattels, while on the premises of the agent, or on other premises hired by him, for any such purpose, are exempt from distress for rent.

#### *Illustrations.*

1. Goods are intrusted to a factor or auctioneer for sale. They are not liable to distress for the rent of the premises of the factor or auctioneer (*k*).

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(*h*) *Frith v. Cartland*, 1865, 34 L. J. Ch. 301.

(*i*) *Broadbent v. Barlow*, 1861, 30 L. J. Ch. 569; 3 De G. F. & J. 570; *Ex p. Alston, Re Holland*, 1868, L. R. 4 Ch. 168.

(*k*) *Williams v. Holmes*, 1853, 8 Ex. 861; 22 L. J. Ex. 283; 91

2. Corn is intrusted to a factor for sale. Not having a warehouse of his own, he deposits the corn in the warehouse of a granary keeper. The corn is privileged from distress for the rent of such warehouse (*l*).

3. An auctioneer hires a room for the purpose of a sale by auction. Goods or chattels sent to the room for sale are privileged from distress, though the room was hired only for the particular occasion (*m*).

4. A. employs an auctioneer to sell goods by auction on A.'s premises. B. sends goods to A.'s premises, to be sold with A.'s goods. The goods of both A. and B. are liable to distress for rent due from A. in respect of the premises (*n*).

5. A. was an agent for the sale of carpets manufactured by B., and the name of B., as well as that of A., was painted outside the premises upon which A. carried on business. A. also acted as agent for the sale, upon the same premises, of carpets manufactured by C., and was entitled to carry on other agency business, though he did not do so. Held, that the goods of B. and C. were not exempt from distress for the rent of the premises, because A. did not carry on a trade or business in which the public were invited to intrust their goods to him (*o*).

R. R. 802; *Adams v. Grane*, 1833, 1 C. & M. 380; 38 R. E. 624; *Gilman v. Elton*, 1821, 6 Moo. 243; 23 R. R. 567; *Findon v. McLaren*, 1845, 6 Q. B. 891; 14 L. J. Q. B. 183; 66 R. R. 588.

(*l*) *Matthias v. Mesnard*, 1826, 2 C. & P. 353.

(*m*) *Brown v. Arundell*, 1850, 20 L. J. C. P. 30; 10 C. B. 54; 84 R. R. 457.

(*n*) *Lyons v. Elliott*, 1876, 1 Q. B. D. 210; 45 L. J. Q. B. 159.

(*o*) *Tapling v. Weston*, 1883, 1 C. & E. 99.

Sect. 6.—*Bribery of agent.*

## Article 113.

## RIGHTS OF PRINCIPAL WHERE AGENT BRIBED.

Where an agent is induced by bribery to depart from his duty to his principal, the person who bribed the agent is liable, jointly and severally with the agent, to the principal for any loss incurred by him in consequence of the breach of duty, without taking into account the amount of the bribe, or any part thereof that may have been recovered by the principal from the agent as money received to his use (*p*).

Every contract or act made or done by an agent under the influence of bribery, or (to the knowledge of the other contracting party) in violation of his duty to his principal, is voidable by the principal (*q*).

An agent who has been bribed is conclusively presumed to be influenced by the bribery in doing

(*p*) Illustration 1. *Morgan v. Elford*, 1876, 4 Ch. D. 352. As to the criminal liability of persons bribing agents, see *Reg. v. De Kromme*, 1892, 66 L. T. 301; *Reg. v. Barber*, 1887, 3 T. L. R. 491; 6 Edw. 7, c. 34 (see Appendix).

(*q*) Illustrations 2 to 4. *Panama Telegraph Co. v. India Rubber, &c. Co.*, 1875, L. R. 10 Ch. 515; 45 L. J. Ch. 121; *Odessa Tramways Co. v. Mendel*, 1877, 8 Ch. Div. 235; 47 L. J. Ch. 505, C. A.; *Matthews v. Gibbs*, 1860, 30 L. J. Q. B. 55; *Maxwell v. Port Tennant Fuel Co.*, 1857, 24 Beav. 495; *Bartram v. Lloyd*, 1904, 90 L. T. 357, C. A.; *Rowland v. Chapman*, 1901, 17 T. L. R. 669.

any act affecting the relations between his principal and the briber (*r*).

*Illustrations.*

1. An agent contracted, on behalf of a corporation, for a supply of coals, the persons with whom he contracted making him an allowance of 1s. per ton, and charging 1s. per ton more than the market price, to enable them to make the allowance. The corporation, on discovering the bribery, sued the persons who supplied the coals for the amount so overcharged. Held, that the defendants were liable, and that the fact that the agent had deposited with the corporation the amount of the bribe, and the corporation had agreed to allow him what was recovered from the defendants, constituted no defence (*s*).

2. A person who dealt with an agent gave him a gratuity in order to influence him, generally, in favour of the giver. The agent was in fact so influenced in making a contract with the giver on the principal's behalf. Held, that the contract was voidable by the principal, although the gratuity was not given in direct relation to the particular contract (*t*).

3. A. agreed to buy a pair of horses from B., provided A.'s agent certified that they were sound. B. secretly offered the agent a certain sum if the horses were sold, and the agent accepted the offer. The agent certified that the horses were sound. Held, that A. was not bound by the contract,

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(*r*) Illustration 3. *Hovenden v. Millhoff*, 1900, 83 L. T. 41, C. A. But see *Rowland v. Chapman*, 1901, 17 T. L. R. 669.

(*s*) *Mayor of Salford v. Lever*, (1891) 1 Q. B. 168; 60 L. J. Q. B. 39, C. A.; *Grant v. Gold Exploration, &c. Syndicate*, (1900) 1 Q. B. 233; 69 L. J. Q. B. 150, C. A.; *Hovenden v. Millhoff*, 1900, 83 L. T. 41, C. A. Comp. *Lands Allotment Co. v. Broad*, 1895, 13 R. 699.

(*t*) *Smith v. Sorby*, 1875, 3 Q. B. D. 522, n.; *Hough v. Bolton*, 1885, 1 T. L. R. 606.



whether the agent was in fact biassed by the offer made to and accepted by him, or not (*u*).

4. A broker who was employed to sell certain property sold it, ostensibly to A., really to A. and himself. Both A. and the broker became insolvent, the goods still being in the broker's possession. Held, that the contract was voidable, and that the principal was entitled to recover the goods as against the broker's trustee in bankruptcy (*x*).

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(*u*) *Shipway v. Broadwood*, (1899) 1 Q. B. 369; 68 L. J. Q. B. 360, C. A.

(*x*) *Ex p. Huth, Re Pemberton*, 1840, Mont. & Ch. 667.

## CHAPTER XII.

## RELATIONS BETWEEN AGENTS AND THIRD PERSONS.

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Sect. 1.—*Liabilities of agents in respect of contracts made by them.*

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## Article 114.

PUBLIC AGENTS NOT LIABLE ON CONTRACTS MADE AS  
SUCH.

No public agent is liable to be sued on any contract made by him on behalf of the Crown or government (*a*); but a public agent is personally liable where he expressly pledges his personal credit (*b*), or where he contracts otherwise than as an agent of the Crown or government (*b*).

*Illustrations.*

1. The Secretary of State for War enters into a contract on behalf of the War Department. He is not liable to be sued on the contract (*c*). Probably, this rule applies even where the contract is under seal, provided that it is expressed

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(*a*) Illustrations 1 to 3. *Palmer v. Hutchinson*, 1881, 6 App. Cas. 619; 50 L. J. P. C. 62, P. C.; *Prosser v. Allen*, 1819, Gow. 117.

(*b*) Illustrations 4 to 6. *Prosser v. Allen*, 1819, Gow. 117.

(*c*) *O'Grady v. Cardwell*, 1873 21 W. R. 340, Ir.

to be made on behalf of the government (*d*). The only remedy in such cases is a petition of right against the Crown (*e*).

2. A colonial governor orders goods. The goods are supplied and debited to the government. The governor is not liable on the contract (*f*).

3. Orders were given for forage to be supplied to a troop, by a clerk who was appointed by the captain of the troop. Held, that the captain was not liable for the price of the forage (*g*).

4. A naval commander, when employing a cook, undertook to pay him a certain sum per annum in addition to the government pay. Held, that the commander was personally liable to pay such additional sum, he having contracted personally, and not as an agent for the government (*h*).

5. A clerk of a county court gave orders for the fitting up, &c. of the court-house. Held, that it was properly left to the jury to say whether he had contracted personally, and that, if he had, he was personally liable on the contract (*i*).

6. The Commissioners of Public Works and Buildings entered into a contract with certain builders for the erection of public buildings. It was held that the Commissioners must be taken to have contracted for themselves, and not merely as agents of the Crown, and that they were liable to be sued by the builders for damages for breach of the contract (*k*).

(*d*) *Unwin v. Wolseley*, 1787, 1 T. R. 674. See *contra*: *Cunningham v. Collier*, 1785, 4 Doug. 233.

(*e*) See Article 39.

(*f*) *Macbeath v. Haldimund*, 1786, 1 T. R. 172; 1 R. R. 177.

(*g*) *Rice v. Chute*, 1801, 1 East, 579.

(*h*) *Clutterbuck v. Coffin*, 1842, 11 L. J. C. P. 65; 3 M. & G. 842; 60 R. R. 628.

(*i*) *Auty v. Hutchinson*, 1848, 17 L. J. C. P. 304; 6 C. B. 266; 77 R. R. 324.

(*k*) *Graham v. Public Works Commrs.*, (1901) 2 K. B. 781; 70 L. J. K. B. 860.

## Article 115.

AGENT LIABLE IF HE CONTRACTS PERSONALLY, BUT NOT  
IF HE CONTRACTS MERELY AS AN AGENT.

Every agent who contracts personally, though on behalf of his principal, is personally liable, and may be sued in his own name, on the contract, whether the principal is named therein, or is known to the other contracting party or not (*l*). But no agent is personally liable on any contract made by him merely in his capacity of an agent, even if he makes it fraudulently, knowing that he has not authority to do so (*m*).

The question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally, and if so, the extent of his liability on the contract (*n*), depend on the intention of the parties to be deduced from the

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(*l*) Illustrations 1 to 13. *Reid v. Dreaper*, 1861, 30 L. J. Ex. 268; 6 H. & N. 813; *Turrel v. Collet*, 1795, 1 Esp. 320; *Watson v. Murrel*, 1824, 1 C. & P. 307; 28 R. R. 779; *Scrace v. Whittington*, 1823, 3 D. & R. 195; 31 R. R. 556. In such cases, either the principal or agent may be sued. A director or officer who enters into a written contract on behalf of a limited company is personally liable on the contract if it does not contain the name of the company together with the word "limited," as required by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 63. See *Dermatine Co. v. Ashworth*, 1905, 21 T. L. R. 510.

(*m*) Illustrations 5, 14 to 16. *Wilson v. Bury*, 1880, 5 Q. B. D. 518; 50 L. J. Q. B. 90, C. A.; *Russel v. Reece*, 1847, 2 C. & K. 669. He may be liable on an implied warranty of authority, see *post*, Article 123.

(*n*) Illustrations 11 and 17.

nature and terms of the particular contract and the surrounding circumstances (*o*).

Where a home agent contracts in England, Wales, or Ireland on behalf of a foreign principal, he is presumed to contract personally, unless a contrary intention plainly appears from the terms of the contract or the surrounding circumstances (*p*).

### *Illustrations.*

1. A. acted as the London agent of C. & Co., who were paper manufacturers in Vienna. B., by letter, ordered paper from A., who in his own name acknowledged the letter, and promised to supply the paper in certain quantities at certain times. A portion of the paper was delivered, and on B. complaining to A. respecting the non-delivery of the remainder, A. stated that it was the default of C. & Co. B. then wrote to C. & Co. telling them of the position of affairs, and the excuses made by A. Subsequently B. sued A. for breach of contract. Held, that A., having contracted personally, was liable, and that B.'s letter to C. & Co. did not amount to an election by B. to substitute C. & Co. for A. as the contracting parties. Some weight was attached to the circumstance that the principals were foreigners (*q*).

2. A solicitor in his own name contracted to buy certain freehold property. Held, that he was personally liable, although he was, in fact, acting on behalf of a client (*r*).

(*o*) Illustrations 1 to 14; and see Articles 116 to 122.

(*p*) *Hutton v. Bulloch*, 1874, L. R. 9 Q. B. 572, Ex. Ch.; *Dramburg v. Pollitzer*, 1873, 28 L. T. 470; *Die Elbinger v. Claye*, 1873, L. R. 8 Q. B. 313; 42 L. J. Q. B. 151; *Reynolds v. Peapes*, 1890, 6 T. L. R. 49; *Peterson v. Ayre*, 1853, 13 C. B. 353; 93 R. R. 573; *Harper v. Keller*, 1915, 84 L. J. K. B. 1696; *Brandt v. Morris*, (1917) 2 K. B. 784, C. A. See Article 118 for rules of construction, where the contract is in writing.

(*q*) *Dramburg v. Pollitzer*, 1873, 28 L. T. 470.

(*r*) *Saxon v. Blake*, 1861, 29 Beav. 438.

So, where a solicitor bought property at a sale by auction, he was held personally liable for the deposit, though he openly declared that he was bidding as trustee for a client (*s*).

3. An agent signed in his own name, without mentioning his principal, an undertaking to accept shares in a company, and the shares were allotted to him. Subsequently, the principal took a larger number of shares, in satisfaction, as the agent said, of his undertaking. Held, that the agent, having personally accepted the shares, was liable as a contributory (*t*).

4. An agent buys goods at a sale by auction, and gives his own name, which is entered as that of the buyer. He is personally liable, unless it be clearly proved that he did not intend to bind himself, and that the auctioneer knew that (*u*).

5. An agent verbally orders goods on behalf of his principal. He is personally liable, unless the seller knows that he is contracting merely as an agent (*x*). But he is not liable if he orders the goods in the principal's name, and credit is given to the principal, or if he tells the seller that he does not intend to be personally responsible (*y*).

6. A broker sent a contract note in his own name, and afterwards a corrected one in the name of the principal, the buyer receiving both notes together. Held, that it was a question for the jury whether he intentionally sent the first contract note in his own name, or sent it merely by mistake, and that if he sent it intentionally, he could not, having contracted personally, afterwards discharge himself by

(*s*) *Hobhouse v. Hamilton*, 1826, 1 Hog. 401, Ir.

(*t*) *Ex p. Bird*, 1864, 33 L. J. Bk. 49; 4 De G. J. & S. 200.

(*u*) *Williamson v. Barton*, 1862, 31 L. J. Ex. 170; 7 H. & N. 899; *Chadwick v. Maden*, 1851, 9 Hare, 188; 89 R. R. 391.

(*x*) *Seaber v. Hawkes*, 1831, 5 M. & P. 549.

(*y*) *Ex p. Hartop*, 1806, 12 Ves. 352; *Johnson v. Ogilby*, 1734, 3 P. Wms. 277; *Owen v. Gooch*, 1797, 2 Esp. 567; *Bonfield v. Smith*, 1844, 12 M. & W. 405.

setting up the agency, even if he was known to be a broker when he made the contract (z).

7. A. and B., on behalf of themselves and other members of a club, order supplies for the use of the club. A. and B. are personally liable on the contract, and it is not necessary to join the other members as defendants (a).

8. A bill of lading whereby goods are deliverable to "the consignee or his assigns, he or they paying freight," is indorsed by the consignee to his agent for sale. The agent takes delivery under the bill of lading as assignee thereof, sells the goods, and pays the proceeds to his principal. The agent is personally liable on an implied contract to pay the freight (b).

9. A broker sells debentures in his own name without disclosing his principal, and sends to the buyer what purports to be a transfer signed by the principal and two other persons. The names of the two other persons were forged by the principal, and they compel the buyer to give up the debentures. The broker is personally liable to repay to the buyer the sum paid by him for the debentures (c).

10. A stockbroker, being instructed to sell shares, and being unable to sell them on the Stock Exchange, sold them outside to an infant, and made out bought and sold notes, acting for both buyer and seller. The shares were sold subject to the rules of the Stock Exchange. It was held that, the transferee being an infant, the broker was liable to indemnify the seller against all liability in respect of the

(z) *Magee v. Atkinson*, 1837, 2 M. & W. 440; 6 L. J. Ex. 115; 46 R. R. 635.

(a) *Cullen v. Queensbury*, 1781, 1 Bro. P. C. 396, H. L.

(b) *Bell v. Kymer*, 1814, 5 Taunt. 477; *Dougal v. Kemble*, 1826, 3 Bing. 383; 28 R. R. 648. Comp. *Amos v. Temperley*, 1841, 8 M. & W. 798; 58 R. R. 876; *Wilson v. Kymer*, 1813, 1 M. & S. 157; 52 R. R. 812; *Ward v. Felton*, 1801, 1 East, 407; *Steel v. Houlder*, 1887, 3 T. L. R. 300, C. A.

(c) *Royal Exchange Ass. v. Moore*, 1863, 8 L. T. 242; *Gurney v. Womersley*, 1854, 24 L. J. Q. B. 46; 4 E. & B. 133; 99 R. R. 390.

shares. By the rules of the Stock Exchange a buying broker is personally liable to the seller if he fails to give the name of a responsible transferee, and the fact that he acts for both buyer and seller does not affect this liability (*d*).

#### *Auctioneers.*

11. Where an auctioneer sells for an undisclosed principal, he is deemed to contract personally, and is liable in damages for non-performance, even if he subsequently offers to name the principal (*e*). The nature and extent of his contract with the purchaser in such a case depend on the conditions of sale, the nature of the subject-matter, and the other surrounding circumstances. Thus, in the case of a sale of standing corn with straw, to be removed at the purchaser's expense, it was held that the auctioneer contracted to give proper authority to enter and carry away the corn and straw, and undertook that he was in fact authorized to sell, but that he did not warrant the title (*f*).

12. An auctioneer sold goods on behalf of a disclosed principal, the conditions of sale providing that the lots should be cleared within three days, and that if from any cause the auctioneer was unable to deliver, &c., the purchaser should accept compensation. Held, that the auctioneer, being in possession of the goods, and having contracted to duly deliver, was personally liable to the purchaser for non-delivery (*g*).

Where a sale by auction is advertised as being "without reserve," the auctioneer impliedly contracts to accept the offer of the highest *bonâ fide* bidder, and is liable to him in damages for breach of such implied contract if he accepts a

(*d*) *Queensland Investment Co. v. O'Connell*, 1896, 12 T. L. R. 502.

(*e*) *Franklyn v. Lamond*, 1847, 4 C. B. 637; 16 L. J. C. P. 221; 72 R. R. 671; *Hanson v. Roberdeau*, 1792, 1 Peake, 163.

(*f*) *Wood v. Baxter*, 1883, 49 L. T. 45. See, however, as to the warranty of title, Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 12.

(*g*) *Woolfe v. Horne*, 1877, 2 Q. B. D. 355; 46 L. J. Q. B. 534; *Williams v. Millington*, 1788, 1 H. Bl. 81; 2 R. R. 724.



bid from the vendor (*h*). But an advertisement to the effect that certain goods will be sold on certain days does not amount to a contract to so sell them, so as to entitle a person who acts on the advertisement to recover damages for loss of time or expenses if the goods are not put up (*i*).

13. *Shipmasters*.—A shipmaster signs a bill of lading, and by mistake delivers the wrong goods to the consignee. He is personally liable in an action for not delivering the goods pursuant to the bill of lading (*k*). So, a shipmaster is personally liable to the seamen for their wages (*l*).

*Not liable if he contracts merely as an agent.*

14. A solicitor is *primâ facie* not personally liable for the expenses of skilled or other witnesses retained or subpoenaed by him (*m*). Nor is he personally liable for sheriff's fees merely because, in the course of his duty, he lodges a writ at the sheriff's office for execution (*n*). In such matters he is deemed to act merely as the agent of his client, unless he expressly pledges his personal credit (*n*). But a solicitor who

(*h*) *Warlow v. Harrison*, 1858, 1 El. & El. 295, 309; 29 L. J. Q. B. 14; 117 E. R. 219, Ex. Ch.; *Heatley v. Newton*, 1881, 19 Ch. D. 326; 51 L. J. Ch. 225, C. A. *Comp. Mainprice v. Westley*, 1865, 34 L. J. Q. B. 229; 6 B. & S. 420; *Rainbow v. Hawkins*, (1904) 2 K. B. 322; 73 L. J. K. B. 641; *McManus v. Fortescue*, (1907) 2 K. B. 1; 76 L. J. K. B. 393, C. A.

(*i*) *Harris v. Nickerson*, 1873, L. R. 8 Q. B. 286; 42 L. J. Q. B. 171.

(*k*) *Bradley v. Dunipace*, 1862, 32 L. J. Ex. 22, Ex. Ch. But see *Parsons v. New Zealand Shipping Co.*, (1901) 1 K. B. 548; 70 L. J. K. B. 404.

(*l*) *The Salacia*, 1863, 32 L. J. Adm. 41; *Buck v. Rawlinson*, 1704, 1 Bro. P. C. 137. As to his liability for repairs, &c. ordered by him, see *Essery v. Cobb*, 1832, 5 C. & P. 358.

(*m*) *Robins v. Bridge*, 1837, 7 L. J. Ex. 49; 3 M. & W. 114; 49 R. R. 531; *Lee v. Everest*, 1857, 26 L. J. Ex. 334; 2 H. & N. 285; 115 R. R. 536. And see *Wakefield v. Duckworth*, (1915) 1 K. B. 218; 84 L. J. K. B. 335 (order for photographs to be used in connection with a trial).

(*n*) *Royle v. Busby*, 1880, 6 Q. B. D. 171; 50 L. J. Q. B. 196, C. A.;

employs a particular bailiff to levy execution is *primâ facie* personally liable to such bailiff for the fees, it being the usual course of business for the solicitor to pledge his personal credit in such a case (*o*).

15. A married woman living with her husband, and having no separate property, orders necessaries, with the authority of her husband, nothing being said by her, and no enquiries being made by the tradesman, as to whether she is pledging her husband's credit, or contracting on her own behalf. She must be taken to have contracted as the agent of her husband, and is not personally liable (*p*).

16. A. professes to contract as an agent for B., the terms of the contract being such as to exclude any supposition of an intention by A. to be personally liable. A. is not liable on the contract, even if he made it fraudulently, knowing that he had no authority from B. (*q*), unless he is shown to be the real principal (*r*); but he may be liable for breach of an implied warranty that he had B.'s authority to make the contract (*s*).

*Liability may be expressly limited.*

17. Where an agent contracts personally, his liability under the contract may be expressly restricted to certain events. Thus where a clause in a charter-party provided

following *Maybery v. Mansfield*, 1846, 9 Q. B. 754; 72 R. R. 440; *Seal v. Hudson*, 1847, 4 D. & L. 760, and overruling *Brewer v. Jones*, 10 Ex. 655.

(*o*) *Newton v. Chambers*, 1844, 13 L. J. Q. B. 141; 1 D. & L. 869; *Maile v. Mann*, 1848, 2 Ex. 608; 76 R. R. 699; *Langridge v. Lynch*, 1876, 34 L. T. 695.

(*p*) *Paquin v. Beauclerk*, (1906) A. C. 148; 75 L. J. K. B. 395, H. L.; affirming *Paquin v. Holden*, 21 T. L. R. 361, C. A.

(*q*) *Lewis v. Nicholson*, 1852, 18 Q. B. 503; 21 L. J. Q. B. 311; 88 R. R. 683; *Jenkins v. Hutchinson*, 1849, 13 Q. B. 744; 18 L. J. Q. B. 274; 78 R. R. 500.

(*r*) See Article 121.

(*s*) See Article 123.

that the liability of the agent as to all matters—as well before as after the shipping of the cargo—should cease as soon as the cargo was shipped, it was held that he was not personally liable for demurrage at the port of discharge (*t*).

### Article 116.

#### LIABILITY ON CONTRACTS UNDER SEAL.

Where an agent is a party to a deed and executes it in his own name, he is personally liable thereon, even if he is described in the deed as acting for and on behalf of a named principal.

#### *Illustrations.*

1. A., on behalf of B., contracted by deed to purchase certain houses, and covenanted that he (A.) would pay 800*l.* for them. The houses were destroyed. Held, that A. was personally liable to pay the 800*l.*, although he had no effects in his hands belonging to B. (*u*). If A. covenants under his own hand and seal for the act of B., A. is personally liable, though he describe himself as covenanting for and on behalf of B. (*x*).

2. The directors of a company contracted by deed to purchase a mine, the price to be paid in twelve months out of moneys raised by the company, with a proviso that if the directors should not by that time have received sufficient

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(*t*) *Oglesby v. Yglesias*, 1858, 27 L. J. Q. B. 356; El. Bl. & El. 930; 113 R. E. 949; *Milvan v. Perez*, 1861, 30 L. J. Q. B. 90; 3 El. & El. 495. Comp. *Christoffersen v. Hansen*, 1872, L. R. 7 Q. B. 509; 41 L. J. Q. B. 217; *Lister v. Van Haansbergen*, 1876, 1 Q. B. D. 269; 45 L. J. Q. B. 495; *Gullischen v. Stewart*, 1884, 13 Q. B. D. 317; 53 L. J. Q. B. 173, C. A.; *Clink v. Radford*, (1891) 1 Q. B. 625; 60 L. J. Q. B. 338, C. A.

(*u*) *Cass v. Rudele*, 1692, 2 Vern. 280, H. L.

(*x*) *Appleton v. Binks*, 1804, 5 East, 148; 7 R. B. 672.

deposits from shareholders, &c. to enable them to pay, they should be allowed a further six months for payment. And the directors covenanted that they would, "out of the said payments so to be made by subscribers or shareholders in the said company," pay, according to the terms specified and subject to the said proviso. Held, that they were personally liable for the price, at the end of the eighteen months (*y*).

3. A mortgagee by deed contracted for a tenancy of the mortgaged property, the contract being expressed to be made between the mortgagee "as agent, hereinafter called the landlord," and the tenant. Held, that it was a question of construction who was the lessor, and on the true construction the contract was that of the mortgagee, and that the mere use of the words "as agent" was not sufficient to prevent the demise operating on the legal estate of the mortgagee (*z*).

#### Article 117.

#### LIABILITY ON BILLS OF EXCHANGE, PROMISSORY NOTES AND CHEQUES.

No agent is personally liable on any bill of exchange, promissory note, or cheque, unless his name appears thereon (*a*).

- (a) Where a bill of exchange is drawn on an agent in his own name and is signed by him, he is personally liable as acceptor, even if he adds words to the signature,

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(*y*) *Hancock v. Hodgson*, 1827, 12 Moore, 504.

(*z*) *Chapman v. Smith*, (1907) 2 Ch. 97; 76 L. J. Ch. 394.

(*a*) 45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882), s. 23; Illustration 6.

indicating that he signs for and on behalf of a principal, or as an agent (*b*).

(*b*) Where a bill of exchange is drawn on a principal, the agent is not liable as acceptor, even if he signs his own name, without qualification (*c*).

(*c*) Where an agent signs a bill of exchange, promissory note, or cheque otherwise than as acceptor of a bill of exchange, he is personally liable, unless he qualifies the signature by adding words thereto, indicating that he signs for and on behalf of a principal, or as an agent. If he so qualifies the signature, he is not personally liable (*d*).

The mere addition to the name or signature of an agent on a bill of exchange, promissory note, or cheque, of words describing him as an agent, does not exempt him from personal liability on the instrument, whether the principal is named therein or not (*e*).

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(*b*) Illustrations 1 and 2. 45 & 46 Vict. c. 61, s. 26 (2); *Herald v. Connah*, 1876, 34 L. T. 885; *Thomas v. Bishop*, 1743, 2 Str. 955.

(*c*) Illustration 3. 45 & 46 Vict. c. 61, s. 26 (2); *Polhill v. Walter*, 1832, 3 B. & Ad. 114; 37 B. R. 344.

(*d*) Illustrations 4 to 11. 45 & 46 Vict. c. 61, s. 26 (1); *Ex p. Buckley*, 1845, 14 M. & W. 469; 69 R. R. 735.

(*e*) Illustrations 2, 7 to 9. 45 & 46 Vict. c. 61, s. 26 (1); *Landes v. Marcus*, 1909, 25 T. L. R. 478.

*Illustrations.**Liability as acceptor.*

1. A bill was drawn on W. Charles, who wrote across it "Accepted, for the Company; W. Charles, purser." Held, that W. Charles was personally liable as acceptor (*f*).

2. A bill was directed to "Messrs. J. and S., joint managers of R. M. M. A. Association," and was accepted "J. J., W. S., as joint managers of R. M. M. A. Association." Held, that J. J. and W. S. were personally liable as acceptors, because, though they were described as agents, the bill was drawn on them personally (*g*). So, where a bill was directed "A. B., purser, W. D. Mining Company," and was accepted "A. B., *per proc.* W. D. Mining Company," A. B. was held personally liable as acceptor (*h*).

3. A bill is directed to a company, and is accepted by the directors in their own names, without qualification. The directors are not liable as acceptors (*i*).

*Liability as drawer or indorser.*

4. An agent draws a bill in his own name. He is personally liable as drawer, even to a holder who knows that he is merely an agent, unless words are added to the signature, indicating that he signs merely as an agent (*k*).

5. A shipmaster draws a bill on his owners in payment for necessaries, the bill concluding with the words "value received in 300 tons coal and disbursements . . . supplied

(*f*) *Mare v. Charles*, 1856, 25 L. J. Q. B. 119; 5 El. & Bl. 978; 108 R. R. 831.

(*g*) *Jones v. Jackson*, 1870, 22 L. T. 828.

(*h*) *Nicholls v. Diamond*, 1853, 9 Ex. 154; 23 L. J. Ex. 1; 96 R. R. 631.

(*i*) *Okell v. Charles*, 1876, 34 L. T. 822, C. A.; *Dermatine Co. v. Ashworth*, 1905, 21 T. L. R. 510.

(*k*) *Leadbitter v. Farrow*, 1816, 5 M. & S. 345; 17 R. R. 345; *Sowerby v. Butcher*, 1834, 4 Tyr. 320.

to my vessel to enable her to complete her voyage . . . for which I hold my vessel, owners and freight responsible." The master is personally liable as drawer, there being nothing in the concluding words excluding such liability (*l*).

6. An agent draws a bill in the name of his principal. The agent is not liable on the bill as drawer (*m*).

7. An agent is under an obligation, as such, to indorse a bill. He may indorse it in such terms as to negative personal liability (*n*), but merely describing himself as an agent for a named principal is not sufficient for that purpose (*n*).

#### *Promissory notes.*

8. The trustees of a building society were held personally liable on a promissory note in the following terms: "On demand, we promise to pay A. B. £200 for the S. G. Provident Building Society"; (signed) "C. D., E. F., G. H., trustees, I. J., secretary" (*o*).

9. Directors have been held personally liable on promissory notes in the following forms:—

(a) "We, directors of A. B. Company, Limited, do promise to pay J. D., &c."; sealed and signed by four directors without qualification (*p*).

(b) "We, directors of A. B. Company, for ourselves and other shareholders of the company, jointly and severally promise to pay, &c., on account of the company"; signed without qualification (*q*).

(*l*) *The Elmville, Ceylon Coaling Co. v. Goodrich*, (1904) P. 319; 73 L. J. P. 104.

(*m*) *Wilson v. Barthrop*, 1837, 2 M. & W. 863.

(*n*) 45 & 46 Vict. c. 61, s. 26 (1).

(*o*) *Allan v. Miller*, 1870, 22 L. T. 825; *Price v. Taylor*, 1860, 29 L. J. Ex. 331; 5 H. & N. 540; 120 R. R. 715.

(*p*) *Dutton v. Marsh*, 1871, L. R. 6 Q. B. 361; 40 L. J. Q. B. 175; *Courtauld v. Saunders*, 1867, 16 L. T. 562.

(*q*) *Penkivil v. Connell*, 1850, 5 Ex. 381; 19 L. J. Ex. 305.

- (c) "We jointly and severally promise, &c., for and on behalf of, &c." Jointly and severally is equivalent to jointly and personally (*r*).
- (d) "We jointly promise to pay J. F., &c."; signed by directors without qualification (*s*).

10. The secretary of a company signed a note in the following form:—"I promise to pay, &c."; (signed) "For M. T. and W Railway Company, J. S., secretary." Held, that he was not personally liable (*t*).

11. A note in the following form was signed by directors, and sealed with the common seal of the society:—"We, two directors of A. B. Society, by and on behalf of the said society, do hereby promise, &c."; (signed) "C. D., E. F., directors." Held, that C. D. and E. F. were not personally liable (*u*).

### Article 118.

#### OTHER WRITTEN CONTRACTS.

The question whether the agent is to be deemed to have contracted personally, in the case of a contract in writing other than a bill of exchange, promissory note, or cheque, depends upon the intention of the parties, as appearing from the terms of the

(*r*) *Healey v. Storey*, 1848, 3 Ex. 3; 18 L. J. Ex. 8; *Bottomley v. Fisher*, 1862, 31 L. J. Ex. 417; 1 H. & C. 211.

(*s*) *Fox v. Frith*, 1842, 10 M. & W. 131; 62 R. R. 546; *Gray v. Raper*, 1866, L. R. 1 C. P. 694.

(*t*) *Alexander v. Sizer*, 1869, L. R. 4 Ex. 102; 38 L. J. Ex. 59.

(*u*) *Aggs v. Nicholson*, 1856, 1 H. & N. 165; 108 R. R. 503; *Lindus v. Melrose*, 1858, 27 L. J. Ex. 326; 3 H. & N. 177; 117 R. R. 636, Ex. Ch.; *Chapman v. Smethurst*, (1909) 1 K. B. 927; 78 L. J. K. B. 654, C. A.



written agreement as a whole, the construction whereof is a matter of law for the Court (*x*)—

- (a) if the contract is signed by the agent in his own name without qualification, he is deemed to have contracted personally, unless a contrary intention plainly appears from other portions of the document (*y*);
- (b) if the agent adds words to his signature, indicating that he signs as an agent, or for or on behalf of a principal, he is deemed not to have contracted personally, unless it plainly appears from other portions of the document, that, notwithstanding such qualified signature, he intended to bind himself (*z*);
- (c) the mere fact that the agent is described as an agent, whether by words connected with or forming part of the signature, or in the body of the contract, and whether

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(*x*) Illustrations 1 to 4. *Spittle v. Lavender*, 1821, 5 Moo. 270; 23 R. R. 508; *Bowes v. Shand*, 1877, 2 A. C. 455; 46 L. J. Q. B. 561.

(*y*) Illustrations 5 to 8. *Dutton v. Marsh*, 1871, L. R. 6 Q. B. 361; 40 L. J. Q. B. 175; *Hick v. Tweedy*, 1890, 63 L. T. 765; *Hough v. Manzanos*, 1879, 4 Ex. Div. 104; 48 L. J. Ex. 398; *Cooke v. Wilson*, 1856, 26 L. J. C. P. 15; 1 C. B. N. S. 153; 107 R. R. 607; *Paice v. Walker*, 1870, L. R. 5 Ex. 173; 39 L. J. Ex. 109; *Chadwick v. Maden*, 1851, 9 Hare, 188; 89 R. R. 391; *Stewart v. Shannessy*, 1900, 2 F. 1288; *Beigtheil v. Stewart*, 1900, 16 T. L. R. 177; *Morley v. Makin*, 1906, 54 W. R. 395.

(*z*) Illustrations 9 to 11. *Green v. Hopke*, 1856, 25 L. J. C. P. 297; 18 C. B. 549; 107 R. R. 404; *Mahony v. Kekulé*, 1854, 23 L. J. C. P. 54; 14 C. B. 390; 98 R. R. 669; *Hahn v. North German Pitwood Co.*, 1892, 8 T. L. R. 557.

the principal is named or not, raises no presumption that the agent did not intend to contract personally (*a*).

This article extends to cases where the contract is made on behalf of a foreign principal (*b*).

### *Illustrations.*

1. An agent entered into a written agreement to grant a lease of certain premises. He was described in the agreement as making it on behalf of the principal, but in a subsequent portion of the document it was provided that he (the agent) would execute the lease. Held, that the agent was personally liable for a breach of the agreement, though the premises belonged to the principal (*c*).

2. The directors of a company signed a contract in the following terms:—"We, the undersigned, three of the directors, agree to repay 500*l.* advanced by A. to the company," and at the same time assigned to A., as security, certain property belonging to the company. Held, that the directors were personally liable (*d*). But where an agent signed a contract in the following form—"I undertake, on behalf of A. (the principal), to pay, &c.," it was held that he was not personally liable (*e*).

3. A broker sent a contract note in the following terms:—

(*a*) Illustration 5. *Paice v. Walker*, *supra*, note (*y*); *Hutcheson v. Eaton*, 1884, 13 Q. B. D. 861, C. A.; *Hopcroft v. Parker*, 1867, 16 L. T. 561.

(*b*) Illustration 8. *Glover v. Langford*, 1892, 8 T. L. R. 628; *Reynolds v. Peapes*, 1890, 6 T. L. R. 49; *Hahn v. North German Pitwood Co.*; *Green v. Hopke*; *Mahony v. Kekulé*, *supra*, note (*z*); *Miller v. Smith*, (1917) 2 K. B. 141; 86 L. J. K. B. 1259, C. A.; *Mercer v. Wright*, 1917, 33 T. L. R. 343.

(*c*) *Norton v. Herron*, 1825, 1 C. & P. 648; 28 R. R. 797; *Tanner v. Christian*, 1855, 24 L. J. Q. B. 91; 4 El. & Bl. 591; 99 R. R. 637.

(*d*) *McCollin v. Gilpin*, 1881, 6 Q. B. D. 516, C. A.

(*e*) *Downman v. Williams* (or *Jones*), 1845, 7 Q. B. 103; 14 L. J. Q. B. 226; 68 R. R. 413, Ex. Ch.; *Avery v. Charlesworth*, 1914, 31 T. L. R. 52, C. A.

“Messrs. S.—I have this day sold by your order and for your account to my principals, &c., one per cent. brokerage”; (signed) “W. A. B.” Held, that W. A. B. was not personally liable in an action for goods sold (*f*).

4. A solicitor wrote—“I hereby undertake to pay on behalf of these creditors (his clients) two-thirds” of certain expenses. Held, that he was personally liable (*g*). So, the solicitor of the assignees of a bankrupt tenant was held personally liable on an undertaking as follows:—“I, as solicitor to the assignees, undertake to pay the landlord his rent, provided it do not exceed the value of the effects distrained” (*h*).

5. A charter-party was expressed to be made between A. B. and C. D., agent for E. F. & Son, and was signed by C. D., without qualification. Held, that C. D. was personally liable, though the principals were named, there being nothing in the terms of the contract clearly inconsistent with an intention to contract personally (*i*).

6. An agent was described in a contract as “consignee and agent on behalf of Mr. M., of L.,” and it was stated that “the said parties agreed,” &c., the contract being signed by the agent in his own name without qualification. Held, that the agent was personally liable (*k*).

7. An agent signed, without qualification, a contract in the following form:—“Sold A. B. 200 quarters wheat (as agent for C. F. & Co., Dantzig).” Held, that the words, “as agent for C. F. & Co., Dantzig,” in the body of the

(*f*) *Southwell v. Bowditch*, 1876, 1 C. P. D. 374; 45 L. J. C. P. 630, C. A.

(*g*) *Hall v. Ashurst*, 1833, 1 C. & M. 714; *Iveson v. Conington*, 1823, 1 B. & C. 160; 25 R. R. 344. *Comp. Alloway v. Duncan*, 1867, 16 L. T. 264.

(*h*) *Burrell v. Jones*, 1819, 3 B. & A. 47; 22 R. R. 296; *Harper v. Williams*, 1843, 4 Q. B. 219; 12 L. J. Q. B. 227; 62 R. R. 334.

(*i*) *Parker v. Winlow*, 1857, 27 L. J. Q. B. 49; 7 El. & Bl. 942; 110 R. R. 904.

(*k*) *Kennedy v. Gouweia*, 1823, 3 D. & R. 503; 26 R. R. 616.

contract, did not clearly show that the agent did not intend to contract personally; and that, as he had signed it without qualification, he was personally liable (*l*). This was a unanimous decision of the Court of Exchequer; but it was disapproved by James, L. J., and Mellish, L. J., in *Gadd v. Houghton* (cited below), on the ground that the words "as agent" were sufficient to show that there was no intention to contract personally.

8. A contract in the following terms—"We have this day sold to you on account of J. M. & Co., Valencia, &c.," was signed by home agents in their own names without qualification. Held, that the agents were not personally liable, though the contract was made on behalf of foreign principals, the words "on account of" clearly showing that there was no intention to contract personally (*m*). So, where a home agent was described as contracting "on behalf of A. B., Roanne," it was held that he was not liable, though he signed the contract in his own name without qualification (*n*).

9. A contract is signed "for A. B., of L., C. Bros., as agents." C. Bros. are not liable, unless it clearly appears from the body of the contract that they intended to bind themselves (*o*). So, where a contract was signed "G. W., J. L., for C. J. M. & Co.," it was held that G. W. and J. L. were not personally liable (*p*).

10. A charter-party was signed "A. B., by authority of and as agent for P., of L.," but A. B. appeared in the body of the agreement as the principal. Held, that A. B. was personally liable, because, notwithstanding the qualified sig-

(*l*) *Paice v. Walker*, 1870, L. R. 5 Ex. 173; 39 L. L. Ex. 109. See also *Brandt v. Morris*, (1917) 2 K. B. 784, C. A.

(*m*) *Gadd v. Houghton*, 1876, 1 Ex. Div. 357; 46 L. J. Ex. 71, C. A.; *Spittle v. Lavender*, 1821, 2 B. & B. 452; 23 R. R. 508.

(*n*) *Ogden v. Hall*, 1879, 40 L. T. 751.

(*o*) *Deslandes v. Gregory*, 1860, 30 L. J. Q. B. 36, Ex. Ch.; *Miller v. Smith*, (1917) 2 K. B. 141; 86 L. J. K. B. 1259, C. A.

(*p*) *Redpath v. Wigg*, 1866, L. R. 1 Ex. 335; 35 L. J. Ex. 211, Ex. Ch.

nature, he appeared from the agreement to have intended to contract personally (*q*).

11. An agent signed a contract—"P. P. A., J. A. & Co., A. B." The contract contained a clause, providing that A. B. should guarantee moneys due from his principal to the other contracting party. Parol evidence was admitted to show that A. B. intended to sign, not only as an agent, but also as a surety. Held, by the Court of Appeal, that such evidence was rightly admitted, and that he must be taken to have signed in both capacities (*r*).

### Article 119.

#### ADMISSIBILITY OF PAROL EVIDENCE OF INTENTION.

Where it appears from the terms of a written contract made by an agent that he contracted personally, parol evidence is not admissible to show that, notwithstanding the terms of the contract, it was the intention of the parties that he should not be personally liable thereon, because such evidence would be contradictory to the written contract (*s*); but he may, by way of equitable defence, prove a verbal agreement that, in consideration of his being merely an agent, he should not be personally liable on the contract, because it would be inequitable in

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(*q*) *Lennard v. Robinson*, 1855, 24 L. J. Q. B. 275; 5 El. & Bl. 125; 103 R. R. 402; *Wilson v. Zulueta*, 1849, 14 Q. B. 405; 19 L. J. Q. B. 49; *Weidner v. Hoggett*, 1876, 1 C. P. D. 533.

(*r*) *Young v. Schuler*, 1883, 11 Q. B. D. 651, C. A.

(*s*) *Higgins v. Senior*, 1841, 8 M. & W. 834; 58 R. R. 884; *Holding v. Elliott*, 1860, 29 L. J. Ex. 134; 5 H. & N. 117; 120 R. R. 504; *Jones v. Littledale*, 1837, 6 L. J. K. B. 169; 1 N. & P. 677; 45 R. R. 542.

such a case to take advantage of his having contracted personally (*t*).

Where it appears from the terms of a written contract made by an agent that he contracted merely as an agent, parol evidence is nevertheless admissible to show that, by a custom or usage in the particular trade or business, an agent so contracting is liable on the contract, either absolutely or conditionally; provided that such custom or usage is not inconsistent with nor repugnant to the express terms of the written contract (*u*).

#### *Illustrations.*

1. An agent signed a charter-party expressly "as agent for principals," the principals being undisclosed. It was held that, though it plainly appeared he did not intend to contract as principal, it might nevertheless be proved that, by a general custom, an agent so signing was, in the ordinary course of trade, personally liable on the contract in the event of his not disclosing the principals within a reasonable time, such a custom not being inconsistent with the terms of the contract (*x*).

2. A broker entered into a contract in the following terms:—"Sold by A. to Messrs. B., for and on account of owner, 100 bales of hops." An action was brought against A. for not delivering the hops according to sample. Evidence of a custom in the hop trade, whereby a broker who does not disclose his principal at the time of the contract is

(*t*) *Wake v. Harrop*, 1862, 31 L. J. Ex. 451; 1 H. & C. 202, Ex. Ch.; affirming 6 H. & N. 768; *Cowie v. Witt*, 1874, 23 W. R. 76. And see *Kidson v. Dilworth*, 1818, 5 Price, 564; 19 R. B. 656.

(*u*) Illustrations 1 to 4.

(*x*) *Hutchinson v. Tatham*, 1873, L. R. 8 C. P. 482; 42 L. J. C. P. 260.

personally liable, was admitted, and the broker was held liable on the contract (*y*).

3. A. and B., who were brokers, contracted in the following terms:—"We have this day sold for your account to our principal, &c." (signed), "A. and B., brokers." Some of the goods were accepted by the principal, whose name was declared by A. and B. before delivery, and an action was subsequently brought against A. and B. for not accepting the residue. Held, that they were personally liable, it being proved that by a custom in the particular trade, the broker was personally liable for his principal's default unless the name of the principal was inserted in the written contract (*z*). So, by the usage of the London dry goods market, where a broker buys goods for an undisclosed principal, he is personally liable for the price (*a*).

4. Brokers entered, as such, into a contract, which contained a clause providing that they should act as arbitrators in the event of any dispute between the parties. Held, that evidence of a custom rendering them personally liable on the contract was inadmissible, because the custom was inconsistent with the clause appointing them arbitrators (*b*).

### Article 120.

#### VERBAL CONTRACTS.

Where an agent makes a contract which is not reduced to writing, the question whether he con-

(*y*) *Pike v. Ongley*, 1887, 18 Q. B. D. 708; 56 L. J. Q. B. 373; *Dale v. Humfrey*, *Humfrey v. Dale*, 1858, 27 L. J. Q. B. 390; El. Bl. & El. 1004; 113 R. R. 964, Ex. Ch. Similar custom in the oil trade.

(*z*) *Fleet v. Murton* (fruit trade and colonial market), 1871, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49. Similar custom in the rice trade: *Bacmeister v. Fenton*, 1883, 1 C. & E. 121.

(*a*) *Imperial Bank v. L. & St. Katharine's Docks Co.*, 1876, 5 Ch. Div. 195; 46 L. J. Ch. 335.

(*b*) *Barrow v. Dyster*, 1884, 13 Q. B. D. 635.

tracted personally or merely in his capacity of an agent is a question of fact (*c*).

*Illustrations.*

1. Brokers sell goods by auction, and invoice them in their own names as sellers. It is a question for the jury whether the invoice was intended to be the contract. If it was, the brokers are personally liable. If it was not, it is a question for the jury whether they intended to contract personally (*d*).

2. An estate agent contracted to sell land, and gave a receipt in his own name for the deposit. Held, that it was a question for the jury whether he contracted personally (*e*). So, where an agent bought goods at a sale by auction, and gave his own name as buyer, it was left to the jury to say whether he contracted personally (*f*).

**Article 121.**

LIABLE IF SHOWN TO BE THE REAL PRINCIPAL.

Where a person professes to contract as an agent, whether in writing or verbally, and it is shown that he is, in fact, himself the principal, and was acting

(*c*) *Lakeman v. Mountstephen*, 1874, L. R. 7 H. L. 17; 43 L. J. Q. B. 188, H. L.; *Gurney v. Womersley*, 1854, 4 E. & B. 133; 24 L. J. Q. B. 46; 99 R. R. 390; *Magee v. Atkinson*, 1837, 2 M. & W. 440; 6 L. J. Ex. 115; 46 R. R. 635; *Seaber v. Hawkes*, 1831, 5 M. & P. 549; *Ex p. Hartop*, 1806, 12 Ves. 352; *Johnson v. Ogilby*, 1734, 3 P. Wms. 277; *Owen v. Gooch*, 1797, 2 Esp. 567; *Castle v. Duke*, 1832, 5 C. & P. 359.

(*d*) *Jones v. Littledale*, 1837, 6 A. & E. 486; 6 L. J. K. B. 169; 45 R. R. 542; *Holdings v. Elliott*, 1860, 5 H. & N. 117; 29 L. J. Ex. 134; 120 R. R. 504.

(*e*) *Long v. Millar*, 1879, 4 C. P. D. 450; 48 L. J. C. P. 596, C. A.

(*f*) *Williamson v. Barton*, 1862, 7 H. & N. 899; 31 L. J. Ex. 170.



on his own behalf, he is personally liable on the contract (*g*).

### Article 122.

#### LIABILITY WHEN PRINCIPAL FICTITIOUS OR NON-EXISTENT.

Where a person professes to contract on behalf of a principal, and the principal is a fictitious or non-existing person, the person so professing to contract is presumed to have intended to contract personally, unless a contrary intention be proved, and where the contract is in writing, such intention cannot be proved by parol evidence, but must appear from the terms of the contract or from the surrounding circumstances.

#### *Illustrations.*

1. A. enters into a written contract on behalf of a company in the course of formation and not yet incorporated. A. is personally liable on the contract, even if he expresses himself as contracting on behalf of the future company, and parol evidence is not admissible to show that he did not intend to contract personally, because it is only by holding him personally liable that any effect at all can be given to the contract (*h*).

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(*g*) *Carr v. Jackson*, 1852, 7 Ex. 382; 21 L. J. Ex. 137; 86 R. R. 699; *Jenkins v. Hutchinson*, 1849, 13 Q. B. 744; 18 L. J. Q. B. 274; 78 R. R. 500; *Railton v. Hodgson*, 1812, 15 East, 67; 13 R. R. 373; *Adams v. Hall*, 1877, 37 L. T. 70.

(*h*) *Kelner v. Baxter*, 1866, L. R. 2 C. P. 174; 36 L. J. C. P. 94; *Wilson v. Baker*, 1901, 17 T. L. R. 473. A company cannot ratify a contract made before its incorporation. *Comp. Hollman v. Pullin*, 1884, 1 C. & E. 254.

2. The promoters of a future company borrowed money from a bank, to be repaid out of calls on shares. Held, that the promoters must be taken to have contracted to repay the money out of calls, if the calls should prove sufficient, and if not, to pay personally (*i*).

3. The managing committee of a club authorize the steward to order provisions for the use of the club. A. supplies provisions on his orders, and invoices them to the club. If A. looked to the funds of the club alone for payment, and contracted on the term that if there were no such funds, he should not be paid, the committee are not personally liable. But they are personally liable if he gave credit to them (*k*). Whether A. gave credit to the committee or looked to the funds of the club alone is a question of fact (*k*).

4. A., a colonel of a volunteer corps, contracts on behalf of the corps with B. A. does not intend to pledge, nor does B. intend to accept, his personal credit, but both think that the corps as an entity may be bound. A. is not personally liable on the contract (*l*).

### Article 123.

#### IMPLIED WARRANTY OF AUTHORITY.

Where any person, by words or conduct, represents that he has authority to act on behalf of another person, and a third person is induced by any such

(*i*) *Scott v. Ebury*, 1867, L. R. 2 C. P. 255; 36 L. J. C. P. 161; *Coutts v. Irish Exhibition*, 1891, 7 T. L. R. 313, C. A.

(*k*) *Steele v. Gourley*, 1887, 3 T. L. R. 772, C. A.; *Overton v. Hewett*, 1887, 3 T. L. R. 246; *Bailey v. Macauley*, 1849, 13 Q. B. 815; 19 L. J. Q. B. 73; 78 R. R. 524.

(*l*) *Jones v. Hope*, 1880, 3 T. L. R. 247, n., C. A. *Comp. Cross v. Williams*, 1862, 31 L. J. Ex. 145; *Samuel v. Weatherby*, (1908) 1 K. B. 184; 77 L. J. K. B. 69, C. A.

representation to act in a manner in which he would not have acted if such representation had not been made, the first-mentioned person is deemed to warrant that the representation is true, and is liable for any loss caused to such third person by a breach of such implied warranty, even if he acted in good faith, under a mistaken belief that he had the authority which he represented himself to have (*m*). Where any such representation is made fraudulently, the person injured thereby may sue either in contract for the breach of warranty, or in tort for the deceit, at his option (*n*).

Every person who professes to contract as an agent is deemed by his conduct to represent that he is in fact duly authorized to make the contract (*o*), except where the nature and extent of his authority or all material facts known to him from which its

(*m*) Illustrations 1 to 12. *Oxenham v. Smythe*, 1861, 31 L. J. Ex. 110; 6 H. & N. 690; *Cherry v. Colonial Bank*, 1869, 38 L. J. P. C. 49, P. C.; *Brown v. Law*, 1895, 72 L. T. 779, H. L. This principle does not extend to public agents, contracting on behalf of the Crown: *Dunn v. Macdonald*, (1897) 1 Q. B. 555; 66 L. J. Q. B. 420, C. A.

(*n*) *Randell v. Trimen*, 1856, 25 L. J. C. P. 307; 18 C. B. 786; 107 R. R. 516; *Polhill v. Walter*, 1832, 3 B. & Ad. 114; 1 L. J. K. B. 92; 37 R. R. 344.

(*o*) *Collen v. Wright*, 1857, 27 L. J. Q. B. 215; 7 El. & Bl. 301; 8 El. & Bl. 647, Ex. Ch.; *Suart v. Haigh*, 1893, 9 T. L. R. 488, H. L. See Illustrations 6 to 11, and Illustrations to Article 124. Where the authority is disputed by the person on whose behalf the contract is made, the person who made the contract may be joined with him as a co-defendant, and relief be claimed against them alternatively: *Honduras Rail. Co. v. Lefevre*, 1877, 2 Ex. D. 301; 46 L. J. Ex. 391; *Bennetts v. McIlwraith*, (1896) 2 Q. B. 464; 65 L. J. Q. B. 632, C. A.

nature and extent may be inferred, are fully known to the other contracting party (*p*).

This article does not extend to a representation made in good faith with regard to a question of law, in which no representation of fact is involved (*q*).

### *Illustrations.*

1. The directors of a company wrote a letter to the company's bankers representing that A. had been appointed manager and had authority to draw cheques on the company's account, the account, to the knowledge of the directors, being already overdrawn. A. further overdraw the account, the directors having, in fact, no authority to overdraw. Held, that the directors were liable to the bankers for breach of an implied warranty that they had the company's authority to overdraw the account (*r*). But the mere fact that directors of a company in that capacity sign cheques drawn on the company's bankers after the account is overdrawn, does not amount to a representation that they have authority to overdraw the account, or to borrow money on the company's behalf (*s*).

2. A. lent 70*l.* to a building society, and received a certificate of the deposit, signed by two directors. The society had no borrowing powers. Held, that the directors were personally liable to A. on an implied warranty that they had authority to borrow on behalf of the society (*t*).

(*p*) Illustrations 9 to 11. See also *Beattie v. Ebury*, cited *infra*, note (*q*).

(*q*) Illustrations 13 and 14. *Beattie v. Ebury*, 1874, 41 L. J. Ch. 804; affirmed L. R. 7 H. L. 102, H. L.; *Saffron Walden Building Society v. Rayner*, 1880, 14 Ch. D. 406; 49 L. J. Ch. 465, C. A.

(*r*) *Cherry v. Colonial Bank*, 1869, 38 L. J. P. C. 49, P. C.

(*s*) *Beattie v. Ebury*, *supra*, note (*q*).

(*t*) *Richardson v. Williamson*, 1871, L. R. 6 Q. B. 276; 40 L. J. Q. B. 145.

3. The directors of a company issued a certificate for debenture stock, which A. agreed to accept in lieu of cash due to him from the company, all the debenture stock that the company had power to issue having already been issued. Held, that the directors were liable to A. on an implied warranty that they had authority to issue valid debenture stock, although they had acted in good faith, not knowing that all the stock had been issued (*u*). So, where directors of a company issued a debenture bond, which was duly sealed and sent to A., who had paid for it, it was held that the directors thereby impliedly warranted that they had authority to issue a debenture which should be valid and binding on the company, the company having, in fact, already fully exercised its borrowing powers (*x*).

4. The directors of an unincorporated company held out the secretary as having authority to borrow in excess of the amount prescribed by the rules of the company. The secretary borrowed in excess of such amount, and misappropriated the money. Held, that the directors were personally liable to the lenders on an implied warranty of authority, though they had not acted fraudulently (*y*).

5. A stockbroker, acting in good faith, induces the Bank of England to transfer consols to a purchaser under a forged power of attorney. He is liable, in an action for breach of an implied warranty of authority, to indemnify the Bank against the claim of the stockholder for restitution (*z*).

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(*u*) *Firbank v. Humphreys*, 1886, 18 Q. B. D. 54; 56 L. J. Q. B. 57, C. A. Comp. *Elkington v. Hurter*, (1892) 2 Ch. 452; 61 L. J. Ch. 514, and Illustration 14.

(*x*) *Weeks v. Propert*, 1873, L. R. 8 C. P. 427; 42 L. J. C. P. 129; *Whitehaven Bank v. Reed*, 1886, 2 T. L. R. 353, C. A. Comp. Illustration 14.

(*y*) *Chapleo v. Brunswick Building Society*, 1881, 6 Q. B. D. 696; 50 L. J. Q. B. 372, C. A. Comp. *Smith v. Reed*, 1886, 2 T. L. R. 442, C. A.

(*z*) *Starkey v. Bank of England*, (1903) A. C. 114; 72 L. J. Ch. 402, H. L. And see *Sheffield Corp. v. Barclay*, (1905) A. C. 392; 74 L. J.

6. A. acts as broker for both buyer and seller. He impliedly warrants to each that he is duly authorized to act on behalf of the other (*a*).

7. An auctioneer by mistake sells a horse by auction without authority. He is liable to the purchaser on an implied warranty of authority for loss of the bargain (*b*). But where goods are sold by auction under conditions which provide that each lot shall be offered subject to a reserve price, and the auctioneer, having by mistake accepted a bid for less than the reserve price, and discovered his mistake at once, withdraws the lot, and refuses to sign a memorandum of the contract, he is not liable in an action for breach of implied warranty of authority, because in such a case the offer, bidding, and acceptance are all conditional on the reserve price having been reached (*c*).

8. The directors of a company accepted a bill of exchange drawn on the company, but told the drawer that they had no power to accept bills on the company's behalf, and that they did it merely in recognition of the company's debt, and on the express understanding that the bill should not be negotiated. Held, that the directors were liable to an indorsee for value, who had no notice of the circumstances, on an implied warranty that they had authority to accept the bill on behalf of the company (*d*).

9. A widow, not having received any information as to her husband's death, ordered necessaries from a tradesman who had previously supplied goods to her on the credit of the hus-

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K. B. 747, H. L.; *Bank of England v. Cutler*, (1908) 2 K. B. 208; 77 L. J. K. B. 889, C. A.

(*a*) *Hughes v. Graeme*, 1864, 33 L. J. Q. B. 335. See also *Queensland Investment Co. v. O'Connell*, 1896, 12 T. L. R. 502.

(*b*) *Anderson v. Croall*, 1904, 6 F. 153.

(*c*) *McManus v. Fortescue*, (1907) 2 K. B. 1; 76 L. J. K. B. 393, C. A. And see *Rainbow v. Hawkins*, (1904) 2 K. B. 322; 73 L. J. K. B. 641.

(*d*) *West London Bank v. Kitson*, 1884, 13 Q. B. D. 360; 53 L. J. Q. B. 345, C. A.

band and been paid for them by him, the husband, to the knowledge of the tradesman, being resident abroad. Held, that the circumstances being equally within the knowledge of both parties, and the widow not having omitted to state any fact known to her which was relevant to the existence or continuance of her authority, she was not liable for the price of the necessaries (*e*). So, a person purporting to contract as agent is not liable as for a breach of warranty of authority if the other contracting party is aware that he is not in fact authorized, or the professing agent expressly disclaims any present authority (*f*).

10. A shipbroker signs a charter-party—"by telegraphic authority; as agent." It is proved that such a form of signature is commonly adopted to negative the implication of any further warranty by the agent than that he has received a telegram, which, if correct, authorizes such a charter-party as he is signing. The shipbroker is not answerable for a mistake in the telegram (*g*).

11. H., a shipbroker, professes to make a charter-party on behalf of A., and signs it—"by telegraphic authority of B.; G. H., as agent." B. is A.'s agent, but A. did not authorize the charter-party. H. is liable for breach of an implied warranty that he had authority to make the charter-party on behalf of A., though he acted in good faith, believing that the telegram from B. gave him such authority (*h*).

12. Where a solicitor, without authority, prosecutes or defends an action, the action will in general be dismissed or the defence struck out on the motion of either the plaintiff

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(*e*) *Smout v. Ilbery*, 1842, 10 M. & W. 1; 62 R. R. 510. In *Salton v. New Beeston Cycle Co.*, (1900) 1 Ch. 43; 69 L. J. Ch. 20, the principle was applied in the case of the dissolution of a company.

(*f*) *Halbot v. Lens*, (1901) 1 Ch. 344; 70 L. J. Ch. 125.

(*g*) *Lilly v. Smales*, (1892) 1 Q. B. 456.

(*h*) *Suart v. Haigh*, 1893, 9 T. L. R. 488, H. L.

or the defendant, and the solicitor so acting without authority be ordered to pay all the costs occasioned thereby (*i*).

13. A. professes to contract on behalf of a volunteer corps with B., both parties erroneously thinking that the corps as an entity may be bound. A. is not liable to B. on an implied warranty of authority, because the facts were equally well known to both, and there was merely a common misconception in point of law (*j*).

14. The directors of a company having no borrowing powers induce A. to advance money on the security of a Lloyd's bond, which they in good faith represent to be a valid security, A. being aware that the company has no borrowing powers. The directors are not liable on an implied warranty of authority, though the bond is invalid, because its validity is a question of law (*k*). So, where directors issued certain stock and described it as No. 1 Preference Stock, in the erroneous belief that they had power to issue stock to rank with the No. 1 Preference Stock already issued, and A. purchased some of the new stock, knowing that it was new stock, but believing that it would rank with the No. 1 Preference, it was held that the directors were not liable to make good

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(*i*) *Hubbart v. Phillips*, 1845, 14 L. J. Ex. 103; 2 D. & L. 707; 67 R. R. 797; *Nurse v. Durnford*, 1879, 13 Ch. Div. 764; 49 L. J. Ch. 229; *Schjott v. Schjott*, 1881, 45 L. T. 333, C. A.; *Newbiggin Gas Co. v. Armstrong*, 1879, 13 Ch. D. 310; 49 L. J. Ch. 231, C. A.; *Reynolds v. Howell*, 1873, L. R. 8 Q. B. 398; 42 L. J. Q. B. 181; *Re Savage*, 1880, 15 Ch. D. 557; *Re Manby*, 1856, 26 L. J. Ch. 313; *Fricker v. Van Grutten*, (1896) 2 Ch. 649; 65 L. J. Ch. 823, C. A.; *Gold Reefs of Western Australia v. Dawson*, (1897) 1 Ch. 115; 66 L. J. Ch. 147; *Geilinger v. Gibbs*, (1897) 1 Ch. 479; 66 L. J. Ch. 230; *Salton v. New Beeston Cycle Co.*, (1900) 1 Ch. 43; 69 L. J. Ch. 20; *Yonge v. Tonybee*, (1910) 1 K. B. 215; 79 L. J. K. B. 208, C. A.; *Simmons v. Liberal Opinion, Ltd.*; *Porter v. Fraser*, 1912, 29 T. L. R. 91; *Fernée v. Gorlitz*, (1915) 1 Ch. 177; 84 L. J. Ch. 404; *In re Dunn*, (1911) 1 K. B. 966; 80 L. J. K. B. 617, C. A. See, however, *Hammond v. Thorpe*, 1834, 1 C. M. & R. 64; *Thomas v. Finlayson*, 1871, 19 W. R. 255.

(*j*) *Jones v. Hope*, 1880, 3 T. L. R. 247, n., C. A.

(*k*) *Rashdall v. Ford*, 1866, L. R. 2 Eq. 750; 35 L. J. Ch. 769.



the misrepresentation, because it was a misrepresentation as to a matter of law, and A. had not been deceived by any misrepresentation of fact (l).

#### Article 124.

#### MEASURE OF DAMAGES FOR BREACH OF WARRANTY OF AUTHORITY.

The measure of damages for breach of an express or implied warranty of authority is the loss sustained, either as a natural and probable consequence, or such as both parties might reasonably expect to result as a probable consequence, of the breach of warranty (m).

Where a contract is repudiated by the person on whose behalf it was made, on the ground that it was made without his authority, such loss is *primâ facie* the amount of damages that could have been recovered from him in an action at law if he had duly authorized and refused to perform the contract, together with the costs and expenses (if any) incurred in respect of any legal proceedings reasonably taken against him on the contract (n). Where the contract would not have been enforceable at law, as against the principal, even if he had duly authorized it, because the formalities required by law

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(l) *Eaglesfield v. Londonderry*, 1876, 38 L. T. 303, H. L.; affirming 4 Ch. D. 693.

(m) Illustrations 1 to 8. *Mitchell v. Kahl*, 1862, 2 F. & F. 709.

(n) Illustrations 3, and 6 to 8.

were not observed, the equitable doctrine of part performance does not apply so as to give a remedy in equity for damages in respect of the breach of warranty of authority (*o*).

### *Illustrations.*

1. The directors of a company represent that they have authority to issue debenture stock, and A. is induced to accept such stock in lieu of cash, in payment of a debt owing to him by the company. The measure of damages for breach of the implied warranty of authority is the amount that A. could have recovered from the company if the stock had been valid (*p*).

2. Directors of a building society represent that they have authority to borrow money on behalf of the society, and A. is induced to lend 70*l.* The society being solvent, the measure of damages for breach of the implied warranty of authority, is 70*l.*, with interest at the rate agreed upon (*q*).

3. A. contracted, on behalf of B., to buy a ship. A. was not authorized, and B. repudiated the contract. The seller having resold the ship at a lower price, it was held that the measure of damages recoverable against A. was the difference between the contract price and the price at which the vessel was resold (*r*).

4. A. instructed B. to apply for shares in a certain com-

(*o*) Illustration 9. Nor is there any remedy at law in such a case, because, the contract not being enforceable at law, there is no legal damage from the breach of warranty. And see Article 123, Illustration 7.

(*p*) *Firbank v. Humphreys*, 1886, 18 Q. B. D. 54; 56 L. J. Q. B. 57, C. A.; *Weeks v. Propert*, 1873, 1. R. 8 C. P. 427; 42 L. J. C. P. 129; *Whitehaven Bank v. Reed*, 1886, 2 T. L. R. 353, C. A.

(*q*) *Richardson v. Williamson*, 1871, L. R. 6 Q. B. 276; 40 L. J. Q. B. 145.

(*r*) *Simons v. Patchett*, 1857, 26 L. J. Q. B. 195; 7 El. & Bl. 568; 110 R. R. 730.

pany. B. by mistake applied for shares in another company, and they were duly allotted to A. The last-mentioned company was ordered to be wound up, and A.'s name was removed from the list of contributories on the ground that he had not authorized the application for shares. Held, that, A. being solvent and the shares unsaleable, the liquidator of the company was entitled to recover from B. the full amount payable on the shares (s).

5. A. brought an action against a company in the United States, and recovered judgment for 1,000*l.* An agent of the company in good faith represented that he had authority to settle for 300*l.*, and A. agreed to accept that sum. The agent was, in fact, not authorized to settle. Held, that, the judgment against the company being, under the circumstances, unenforceable, A. was entitled to recover 300*l.* from the agent for the breach of the implied warranty of authority (t).

*Costs of action against principal.*

6. A. bought goods, professedly on behalf of B. The seller brought an action for the price against B., which was dismissed with costs, on the ground that A. was not authorized by B. Held, that the seller was entitled to recover from A. the price of the goods, and also the costs incurred in the action against B. (u).

7. A. professed to sell property on behalf of B. Held, that A., not being authorized to sell, was liable to the buyer for the costs of a suit for specific performance against B., as well as for the value of the contract (x). But where an

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(s) *Re National Coffee Palace Co., Ex p. Panmure*, 1883, 24 Ch. Div. 367; 53 L. J. Ch. 57, C. A.

(t) *Meek v. Wendt*, 1888, 21 Q. B. D. 126.

(u) *Randell v. Trimen*, 1856, 18 C. B. 786; 25 L. J. C. P. 307; 107 R. R. 516.

(x) *Hughes v. Graeme*, 1864, 33 L. J. Q. B. 335; *Collen v. Wright*, 1857, 8 El. & Bl. 647; 27 L. J. Q. B. 215, Ex. Ch.

agent without authority verbally contracted to grant a lease for seven years, and the lessee entered into possession and defended an action of ejectment brought by the owner of the property, it was held that the lessee was not entitled to recover from the agent the costs of such action, as damages for the breach of warranty of authority, because he could not have successfully defended an action of ejectment, even if the agent had been duly authorized to grant the lease (*y*).

8. *Loss must be a natural and probable consequence of the breach.*—A. contracted to sell an estate to B., and sent him an abstract of title, representing that he had the authority of the owners to sell. The owners repudiated the contract and sold the estate at a higher price to C. B. sued the owners until they had all sworn that A. was not authorized to sell, and was then non-suited. In an action by B. against A., it was held that the measure of damages for the breach of warranty of authority was—(1) the costs of investigating the title; (2) the costs of the action up to the non-suit; and (3) the difference between the contract and market prices of the estate, the price at which it was resold to C. being *prima facie* evidence of the market price; but that the loss on a re-sale of horses, which were bought to stock the land before the investigation of the title and without notice to A., was too remote a consequence of the breach of warranty and was not recoverable, it not appearing that the purchase of stock was distinctly contemplated by the parties when the contract was made (*z*). So, where an agent without authority granted a lease, and the lessee agreed to sell his interest, it was held that damages and costs recovered against the lessee for breach of such agreement to sell could not be recovered by him in an action against the agent for breach of warranty of authority, because such damages and

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(*y*) *Pow v. Davis*, 1861, 30 L. J. Q. B. 257; 1 B. & S. 220. Such a lease must be by deed (8 & 9 Vict. c. 106, s. 3), and every contract for a lease must be in writing (Statute of Frauds, s. 4).

(*z*) *Godwin v. Francis*, 1870, L. R. 5 C. P. 295; 39 L. J. C. P. 121.

costs were not a natural and probable consequence of the breach of warranty; but that the lessee was entitled to recover the value of the lease, and the costs of a suit for specific performance against the principal (a).

9. *No remedy on doctrine of part performance.*—A. verbally contracts, without authority, to sell real estate to B. B. has no remedy in equity against A. for the breach of warranty of authority, on the ground of part performance (b).

Sect. 2.—*Liabilities of agents in respect of moneys received by them.*

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#### Article 125.

##### TO REPAY MONEY RECEIVED FOR USE OF PRINCIPAL.

Where money is paid to an agent for the use of his principal, and the circumstances of the case are such that the person paying the money is entitled to recover it back, the agent is personally liable to repay such money in the following cases, namely:—

- (a) Where the agent contracts personally, and the money is paid to him in respect of or pursuant to the contract, unless the other contracting party elects to give exclusive credit to the principal (c);
- (b) Where the money is obtained by duress (d),

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(a) *Spedding v. Nevell*, 1869, L. R. 4 C. P. 212; 38 L. J. C. P. 133.

(b) *Warr v. Jones*, 1876, 24 W. R. 695; *Sainsbury v. Jones*, 1840, 2 Beav. 462; 48 R. R. 217. Nor is there any remedy at law in such a case, in consequence of the provisions of the 4th section of the Statute of Frauds.

(c) Illustrations 1 and 9.

(d) Illustration 2. This does not apply where the duress does not

or by means of any fraud or wrongful act (*e*) to which the agent is party or privy ;

- (*c*) Where the money is paid under a mistake of fact, or under duress, or in consequence of some fraud or wrongful act, and repayment is demanded of the agent, or notice is given to him of the intention of the payer to demand repayment, before he has in good faith paid the money over to, or otherwise dealt to his detriment with, the principal in the belief that the payment was a good and valid payment (*f*)

Except as in this Article provided, no agent is personally liable to repay money received by him for the use of his principal (*g*).

### *Illustrations.*

1. An agent discounts certain bills, and in good faith pays over the proceeds to his principal. The bills turn out to be forgeries. The discounter has no remedy against the agent unless he indorsed or guaranteed the bills, or dealt as a

proceed from the agent, and he has paid over the money without notice that it was paid under duress: *Owen v. Cronk*, (1895) 1 Q. B. 265; 64 L. J. Q. B. 288.

(*e*) Illustrations 3 to 5. *Townson v. Wilson*, 1808, 1 Camp. 396; *Steele v. Williams*, 1853, 8 Ex. 625; 22 L. J. Ex. 225; 91 R. R. 673.

(*f*) Illustration 9. *Cary v. Webster*, 1731, 1 Str. 480.

(*g*) Illustrations 1, 6 to 11. *Cary v. Webster*, 1731, 1 Str. 480; *Greenway v. Hurd*, 1792, 4 T. R. 553; *Davys v. Richardson*, 1888, 21 Q. B. D. 202; 57 L. J. Q. B. 409, C. A.; *Taylor v. Metropolitan Rail.*, (1906) 2 K. B. 55; 75 L. J. K. B. 735.

principal with the discounteer (*h*). But the agent is personally liable to repay the amount, as upon a total failure of consideration, if he dealt as a principal with the discounteer (*i*).

2. A sheriff issued a warrant of distress against A. The bailiff levied the debt on the goods of B., and, under terror of the illegal distress, B. paid the debt. Held, that the bailiff was personally liable to repay B., though he had paid the amount over to the sheriff (*k*).

3. Pending a bankruptcy petition, and with notice of the act of bankruptcy, a solicitor, as the agent of the petitioning creditor, received from the debtor various sums of money in consideration of the adjournment of the petition, and paid such sums over to his principal. Held, that the solicitor was personally liable to repay the amount to the trustee in bankruptcy, notwithstanding the payment over, because the money was obtained wrongfully (*l*).

4. An agent who acts for an executor *de son tort* is personally liable to account for assets collected by him, even if he has paid them over to his principal. Payment over is no defence in the case of wrongdoers (*m*).

5. An agent demands more money than is due, and wrongfully withholds documents from A., who pays him the amount demanded, under protest, in order to recover the documents. The agent is personally liable to A. in respect of the amount overpaid, even if he has paid the money over to the principal (*n*).

(*h*) *Ex p. Bird, Re Bourne*, 1851, 20 L. J. Bk. 16; 4 De G. & S. 273.

(*i*) *Gurney v. Womersley*, 1854, 4 E. & B. 133; 24 L. J. Q. B. 46; 99 R. R. 390; *Royal Exchange Ass. v. Moore*, 1863, 8 L. T. 242.

(*k*) *Snowden v. Davis*, 1808, 1 Taunt. 359. *Comp. Goodall v. Lowndes*, 1844, 6 Q. B. 464; 66 R. R. 463.

(*l*) *Ex p. Edwards, Re Chapman*, 1884, 13 Q. B. D. 747, C. A.

(*m*) *Sharland v. Mildon*, 1846, 15 L. J. Ch. 434; 5 Hare, 469; 71 R. R. 180; *Padget v. Priest*, 1787, 2 T. R. 97; 1 R. R. 440.

(*n*) *Smith v. Sleep*, 1844, 12 M. & W. 585; *Oates v. Hudson*, 1851,

6. An insurance agent received money from an underwriter in respect of a voidable policy, and settled with the principal for the amount, amongst other matters, without notice of the underwriter's intention to dispute the policy, and without fraud. Held, that the agent was not liable to repay the amount to the underwriter, who had paid it to him under a mistake of fact (*o*).

7. A bill of exchange was indorsed, without the holder's authority, to A. The acceptor paid A.'s agent for collection, who handed the money over to A. without notice of any defect in A.'s title. The acceptor was compelled to pay over again to the holder whose authority was wrongfully assumed. Held, that A.'s agent for collection was not personally liable to refund the amount to the acceptor (*p*).

8. The solicitor of the vendor at a sale by auction receives a deposit as agent for the vendor. The sale goes off through the vendor's default. The purchaser cannot maintain an action against the solicitor for the return of the deposit, whether he has paid it over to the vendor or not (*q*).

9. A. bought goods from B., a broker, and by mistake paid him too much. B. gave his principal, who was largely indebted to him, credit for the amount received. Held, that B. was liable to repay to A. the amount paid in excess, on the ground (1) that B. virtually dealt as principal with A., and (2) that the mistake accrued to B.'s personal benefit (*r*). Where there is no actual change of circumstances to the detriment of the agent in consequence of the payment, the

6 Ex. 346; 20 L. J. Ex. 284; 86 R. R. 326; *Wakefield v. Newbon*, 1844, 6 Q. B. 276; 13 L. J. Q. B. 258; 66 R. R. 379; *Close v. Phipps*, 1844, 7 M. & G. 586.

(*o*) *Holland v. Russell*, 1863, 32 L. J. Q. B. 297; 4 B. & S. 14, Ex. Ch.; *Shand v. Grant*, 1863, 15 C. B. N. S. 324.

(*p*) *East India Co. v. Tritton*, 1824, 5 D. & R. 214; 27 R. R. 353.

(*q*) *Ellis v. Goulton*, (1893) 1 Q. B. 350; 62 L. J. Q. B. 232, C. A.; *Bamford v. Shuttleworth*, 1840, 11 A. & E. 926; 52 R. R. 542; *Hurley v. Baker*, 1846, 16 M. & W. 26.

(*r*) *Newall v. Tomlinson*, 1871, L. R. 6 C. P. 405.



mere fact that he has credited the principal with the amount is not sufficient to discharge him from liability to repay money paid to him under a mistake of fact (*s*).

10. The auctioneer at a sale by auction receives a deposit, and pays it over to the vendor. He is personally liable to refund the amount on the default of the vendor, because it was his duty to hold it as a stakeholder until the completion or rescission of the contract (*t*). But he is not liable to pay interest, however long he may have held the deposit, until it has been demanded, and he has improperly refused to pay it over to the person entitled (*u*)—at all events unless he is shown to have received interest on the money (*x*).

11. An auctioneer sold certain shares by private contract, and received a deposit. The purchaser declined to complete, on the ground that the contract was void as not complying with the provisions of Leeman's Act (30 Vict. c. 29), and sued the auctioneer for the return of the deposit. Held, that, the auctioneer having paid over the amount of the deposit to the vendor before the repudiation of the contract, the purchaser was not entitled to recover, because the auctioneer was authorized to pay over the deposit to the vendor either on the completion of the contract or on the purchaser's refusal to complete, and such authority had not been revoked (*y*).

(*s*) *Buller v. Harrison*, 1777, Cowp. 565; *Cox v. Prentice*, 1815, 3 M. & S. 344; 16 R. R. 288; *Kleinwort v. Dunlop Rubber Co.*, 1907, 97 L. T. 263, H. L.

(*t*) *Burrough v. Skinner*, 1770, 5 Burr. 2639; *Gray v. Gutteridge*, 1827, 3 C. & P. 40; 31 R. R. 343; *Furtado v. Lumley*, 1890, 6 T. L. R. 168; *Edwards v. Hodding*, 1814, 5 Taunt. 815; 15 R. R. 662.

(*u*) *Lee v. Munn*, 1817, 1 Moore, 481; 19 R. R. 452; *Gaby v. Driver*, 1828, 2 Y. & J. 549; 31 R. R. 629.

(*x*) *Curling v. Shuttleworth*, 1829, 6 Bing. 121, 134.

(*y*) *Galland v. Hall*, 1888, 4 T. L. R. 761, C. A. And see *Hindle v. Brown*, 1908, 98 L. T. 791, C. A.

**Article 126.**

## MONEY RECEIVED FOR USE OF THIRD PERSONS. .

Where a specific fund (*z*) existing or accruing in the hands of an agent to the use of his principal, is assigned or charged by the principal to or in favour of a third person, the agent is bound, upon receiving notice of the assignment or charge, to hold the fund, or so much thereof as is necessary to satisfy the charge, to the use of such third person (*a*).

Where an agent is directed or authorized by his principal to pay to a third person money existing or accruing in his hands to the use of the principal, and he expressly or impliedly contracts with such third person to pay him, or to receive or hold the money on his behalf, or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf, or for his use, as the case may be, even if he has had fresh instructions from the principal not to pay such third person (*b*).

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(*z*) See *Citizens' Bank v. National Bank*, 1874, L. R. 6 H. L. 352; 43 L. J. Ch. 269, H. L.

(*a*) Illustration 1. As to the distinction between an equitable assignment of or charge on a fund, and a mere authority to pay money out of the fund, see Illustrations, 1, 5 and 8, and cases there cited. See also *Ex p. Hall, Re Whitting*, 1879, 10 Ch. D. 615; 48 L. J. Bk. 79, C. A.; *Brandt v. Dunlop Rubber Co.* (1905) A. C. 454; 74 L. J. K. B. 398, H. L.

(*b*) Illustrations 2 to 4. *Griffin v. Weatherby*, 1868, L. R. 3 Q. B. 753; 37 L. J. Q. B. 280; *Hodgson v. Anderson*, 1825, 3 B. & C. 842; *Lilly v. Hays*, 1836, 5 A. & E. 548.

Except as in this article provided, no agent is liable or accountable to any third person in respect of money in his hands which he has been directed or authorized to pay to such third person (c).

### *Illustrations.*

1. A principal assigns a specific fund existing or accruing in the hands of his agent to his use, and the assignee gives notice to the agent of the assignment. The agent is bound to account for the fund to the assignee (d), subject to any right of lien or set-off the agent may have against the principal at the time when he receives notice of the assignment (e). So, if a debtor charges a fund in the hands of his agent with payment of the debt, the agent is liable to the creditor upon receiving notice of the charge (d).

2. A principal gives his agent authority to pay money to A., a third person. The agent promises A. that he will pay him when the amount is ascertained. The agent is liable to A. for the amount when it is ascertained, though in the meantime the principal has become bankrupt (f), or has countermanded his authority (g).

3. A principal writes a letter authorizing his agent to pay to A. the amounts of certain acceptances, as they become due, out of the proceeds of certain assignments. A. shows

(c) Illustrations 5 to 8. *Gibson v. Minet*, 1824, 9 Moore, 31; *Whar-  
ton v. Walker*, 1825, 6 D. & R. 288.

(d) *Webb v. Smith*, 1885, 30 Ch. D. 192; 55 L. J. Ch. 343, C. A.;  
*Ex p. South*, 1818, 3 Swan. 392; 19 R. R. 227; *Rodick v. Gandell*,  
1852, 1 De G. M. & G. 763; 91 R. R. 282; *Greenway v. Atkinson*,  
1881, 29 W. R. 560; *Brandt v. Dunlop Rubber Co.*, (1905) A. C. 454;  
74 L. J. K. B. 898, H. L.

(e) *Roxburghe v. Cox*, 1881, 17 Ch. D. 520; 50 L. J. Ch. 772, C. A.;  
*Webb v. Smith*, *supra*.

(f) *Crowfoot v. Gurney*, 1832, 2 L. J. C. P. 21; 9 Bing. 372; 35  
R. R. 557.

(g) *Robertson v. Fauntleroy*, 1823, 8 Moore, 10.

the letter to the agent, who assents to the terms of it. Before the acceptances fall due, the principal becomes bankrupt, and the agent pays the proceeds of the assignments to the trustee in bankruptcy. The agent is personally liable to A. for the amounts of the acceptances as they become due (*h*).

4. A bill drawn on an agent is made payable out of a particular fund, and the agent promises to pay the holder when he receives money for the principal. The agent is liable to the holder, if he subsequently receives the money (*i*).

5. An acceptor of a bill pays money to a banker for the purpose of taking up the bill, and the banker promises to apply the money accordingly. The banker refuses to take up the bill, and claims to retain the money for a balance due to him from the acceptor. The drawer of the bill has no right of action, either at law or in equity, against the banker to compel him to apply the money to the payment of the bill, there being no privity of contract between them (*k*). So, where an agent is authorized to pay a debt out of moneys in his hands, and there is no assignment of or charge on such moneys to or in favour of the creditor, the agent is not liable to the creditor, unless he expressly, or impliedly contracts to pay him, or to hold the money to his use (*l*).

(*h*) *Walker v. Rostron*, 1842, 9 M. & W. 411; 60 R. R. 770; *Frühling v. Schroder*, 1835, 7 C. & P. 103; *Hamilton v. Spottiswoode*, 1849, 4 Ex. 200; 18 L. J. Ex. 393; 80 R. R. 519; *Noble v. National Discount Co.*, 1860, 29 L. J. Ex. 210; 5 H. & N. 225; 120 R. R. 552.

(*i*) *Stevens v. Hill*, 1805, 5 Esp. 247; *Langston v. Corney*, 1815, 4 Camp. 176.

(*k*) *Moore v. Bushell*, 1857, 27 L. J. Ex. 3; 114 R. R. 984; *Hill v. Royds*, 1869, L. R. 8 Eq. 290; 38 L. J. Ch. 538; *Johnson v. Roberts*, 1875, L. R. 10 Ch. 505; 44 L. J. Ch. 678.

(*l*) *Williams v. Everett*, 1811, 14 East, 582; 13 R. R. 315; *Howell v. Batt*, 1833, 2 N. & M. 381; *Malcolm v. Scott*, 1850, 5 Ex. 601; *Brind v. Hampshire*, 1836, 1 M. & W. 365; *Wedlake v. Hurley*, 1830; 1 C. & J.

6. An agent receives money for the express purpose of taking up a bill two days after its maturity. On tendering the money, he finds that the holders have sent back the bill, protested for non-acceptance, to their indorsers. He then receives fresh instructions not to pay. He is not liable to the holders of the bill, not having agreed to hold the money to their use (*m*). So, where an agent who was authorized to pay money to a third person, offered to pay on a condition to which such third person would not agree, it was held that that was not a sufficient agreement to render him liable to such third person (*n*).

7. An agent of an executor wrote to a legatee, stating and offering to remit the amount of his legacy, and subsequently remitted the amount, after deducting certain expenses. Held, that the agent had not contracted with the legatee, and was not liable to an action at his instance for the amount so deducted (*o*).

8. A. gives B. a cheque on A.'s banker. The cheque does not operate as an assignment to B. of money in the banker's hands belonging to A., and B. has no right of action against the banker for wrongfully dishonouring the cheque (*p*).

83; 35 R. R. 688; *Bell v. N. W. Rail.*, 1852, 15 Beav. 548; 92 R. R. 538; *Morrell v. Wootten*, 1852, 16 Beav. 197; 96 R. R. 95; *Scott v. Porcher*, 1817, 3 Meriv. 652; 17 R. R. 161.

(*m*) *Stewart v. Fry*, 1817, 1 Moore, 74.

(*n*) *Baron v. Husband*, 1833, 4 B. & Ad. 611.

(*o*) *Barlow v. Browne*, 1846, 16 L. J. Ex. 62; 16 M. & W. 126.

(*p*) *Schroeder v. Central Bank*, 1876, 34 L. T. 735; *Hopkinson v. Forster*, 1874, L. R. 19 Eq. 74.

## Article 127.

PUBLIC AGENTS NOT LIABLE TO THIRD PERSONS FOR  
MONEY DUE TO THEM.

No public agent is liable or accountable to any third person, either at law or in equity, in respect of any money which as a public agent it is his duty to pay to such third person (*q*).

This Article applies also to agents of foreign States (*r*).

*Illustrations.*

1. The Secretary for War was sued by a retired clerk of the War Office for his retired allowance. Held, that the action would not lie, even if the defendant was shown to have received the money applicable to such allowance (*s*). Nor will a mandamus lie to the Lords of the Treasury or Secretaries of State to compel them to deal with public moneys in their hands according to the provisions of the Appropriation Act or a Royal Warrant. They are answerable to the Crown, and to the Crown alone (*t*).

2. Booty was granted by the Queen to the Secretary of State for India in Council, in trust to distribute it to those who were found to be entitled thereto. Held, that he, being merely an agent of the Crown to distribute the fund, was

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(*q*) Illustrations 1 and 2. *Salaman v. Secretary of State for India*, (1906) 1 K. B. 613; 75 L. J. K. B. 418, C. A.

(*r*) *Twycross v. Dreyfus*, 1877, 5 Ch. D. 605; 46 L. J. Ch. 510, C. A.; *Henderson v. Rothschild*, 1887, 56 L. J. Ch. 471, C. A.

(*s*) *Gidley v. Palmerston*, 1822, 3 B. & B. 275; 24 R. R. 668.

(*t*) *Reg. v. Secretary of State for War*, (1891) 2 Q. B. 326; 60 L. J. Q. B. 457, C. A.; *Reg. v. Treasury*, 1872, L. R. 7 Q. B. 387; 41 L. J. Q. B. 178.

not liable to account as a trustee to persons who were entitled to the booty (*u*). So, a Secretary of State is not accountable as a trustee for funds voted by Parliament, and received by him from the Treasury for the public service (*x*).

Sect. 3.—*Rights of agents against third persons.*

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### Article 128.

#### RIGHT OF AGENT TO SUE IN OWN NAME ON CONTRACTS MADE BY HIM.

An agent may sue in his own name on contracts made by him on behalf of his principal in the following cases, namely :—

- (a) where he contracts personally (*y*) ;
- (b) where, as in the case of factors and auctioneers, he has a special property in, or lien upon, the subject-matter of the contract, or has a beneficial interest in the completion thereof (*z*) ;
- (c) in the case of insurance brokers, who may

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(*u*) *Kinloch v. Secretary of State for India*, 1882, 7 A. C. 619 ; 51 L. J. Ch. 885, H. L.

(*x*) *Grenville-Murray v. Clarendon*, 1869, L. R. 9 Eq. 11.

(*y*) Illustrations 1 and 2. *Robertson v. Wait*, 1853, 8 Ex. 299 ; 22 L. J. Ex. 209 ; 91 R. R. 497 ; *Harper v. Williams*, 1843, 4 Q. B. 219 ; 12 L. J. Q. B. 227 ; 62 R. R. 334 ; *Agacio v. Forbes*, 1861, 14 Moo. P. C. 160 ; *Joseph v. Kroc*, 1813, 3 Camp. 320 ; 53 R. R. 250. See Articles 115 to 120, as to when an agent is deemed to contract personally.

(*z*) Illustration 3. *Snee v. Prescott*, 1743, 1 Atk. 248 ; *Fisher v. Marsh*, 1865, 34 L. J. Q. B. 177 ; 6 B. & S. 411 ; *Dickenson v. Naul*, 1833, 4 B. & Ad. 638.

sue in their own names on all policies effected by them (*a*).

Where a person who enters into a contract professedly as an agent is in fact the real principal, he may sue on the contract—

if it has been partly performed or otherwise affirmed by the other contracting party with the knowledge that he is the real principal (*b*); and

(probably) in all cases where the identity of the contracting party is not a material element in the making of the contract, provided that he gives notice to the other contracting party, before action, that he is the real principal (*c*).

Except as in this article provided, no agent can maintain an action in his own name on any contract made by him as such (*d*), whether the principal be disclosed or undisclosed (*d*), and whether the agent was acting under a *del credere* commission or not (*e*).

(*a*) *Provincial Insurance Co. v. Leduc*, 1874, L. R. 6 P. C. 224; 43 L. J. P. C. 49, P. C.; *Oom v. Bruce*, 1810, 12 East, 225; 11 R. R. 367; *Kensington v. Inglis*, 1807, 8 East, 273; 9 R. R. 438. See also *Lloyd's v. Harper*, 1881, 16 Ch. D. 290; 50 L. J. Ch. 140, C. A.

(*b*) Illustration 4.

(*c*) Illustrations 4 to 6. *Bickerton v. Burrell*, 1816, 5 M. & S. 383.

(*d*) Illustrations 7 to 12. *Sargent v. Morris*, 1820, 3 B. & A. 277; 22 R. R. 382; *Gray v. Pearson*, 1870, L. R. 5 C. P. 568. See also *Burgos v. Nascimento*, 1909, 100 L. T. 71; *Jordeson v. London Hardwood Co.*, 1914, 110 L. T. 666.

(*e*) *Bramwell v. Spiller*, 1870, 21 L. T. 672.



*Illustrations.*

1. A contract was made in the following form:—"It is mutually agreed between J. & R. W., of the one part, and S. J. C., on behalf of G. & M. Rail. Co., of the other part, &c." (signed) "J. & R. W., S. J. C." Held, that S. J. C. was entitled to sue in his own name for breach of the contract, he having contracted personally (*f*).

2. A broker contracted in writing in his own name to purchase goods, the seller being told that there was a principal. The broker then, under a general authority from the principal, contracted to resell the goods. On hearing of the last-mentioned contract, the principal refused to have anything to do with the goods, and the broker acquiesced. The seller then refused to deliver the goods. Held, that the broker, having contracted personally, had a right to recover damages for the non-delivery, and that the principal's renunciation of the contract did not affect that right (*g*).

3. An auctioneer sells goods at the house of the owner, and the purchaser knows that they are the owner's property. The auctioneer may, nevertheless, sue in his own name for the price, because he has a special property in the goods (*h*). The right of an auctioneer to sue on a cheque given to him in payment for goods sold is not affected by the circumstance that the vendor was guilty of fraudulent misrepresentations, if the auctioneer was not a party to the fraud, and has settled with the principal in ignorance thereof (*i*).

4. A., professedly as agent for a named principal, contracted in writing to sell certain goods. The buyer, with notice that A. was the real principal, accepted and paid for

(*f*) *Cooke v. Wilson*, 1856, 1 C. B. N. S. 153; 26 L. J. C. P. 15; 107 R. R. 607; *Clay v. Southern*, 1852, 7 Ex. 717; 21 L. J. Ex. 202; *Brandt v. Morris*, (1917) 2 K. B. 784, C. A.

(*g*) *Short v. Spackman*, 1831, 2 B. & Ad. 962.

(*h*) *Williams v. Millington*, 1788, 1 H. Bl. 81; 2 R. R. 724.

(*i*) *Hindle v. Brown*, 1908, 98 L. T. 791, C. A.

part of the goods. Held, that A. might sue for the non-acceptance of the residue (*j*).

5. A. signed a charter-party "as agent for the freighter," a clause being inserted therein limiting A.'s liability to certain events in view of his being an agent. A. was himself the freighter. Held, that he might sue on the contract (the clause limiting his liability would be inoperative). Otherwise, if the other contracting party had relied on his character as agent, and would not have contracted with him had he known him to be the principal. The freighter, whoever he might have been, would have had a right to sue (*k*).

6. A broker signed a contract note, professedly as agent for an undisclosed principal. He was, in fact acting on his own behalf, but the other contracting party was not aware of that. Held, that he could not sue on the contract, because there was no memorandum thereof to satisfy the 17th section of the Statute of Frauds. Some of the judges in this case laid down that he had no right to sue because no contract had been made with him (*l*).

7. A broker sent a contract note in the following form:—"I have this day sold you, on account of B., &c." (signed) "A. B., broker." Held, that the broker had no right of action in his own name against the buyer for refusing to accept the goods (*m*). So, where a broker sent a contract note as follows:—"Mr. L., I have this day bought in my own name for your account, of A. K. T., &c." (signed) "A. B., broker"—it was held that he had no right to sue L. for the price (*n*). A broker who makes a contract as such has no

(*j*) *Rayner v. Grote*, 1846, 16 L. J. Ex. 79; 15 M. & W. 359; 71 R. R. 709.

(*k*) *Schmaltz v. Avery*, 1851, 20 L. J. Q. B. 228; 83 R. R. 653; *Harper v. Vigers*, (1909) 2 K. B. 549; 78 L. J. K. B. 867. See, however, Illustration 6.

(*l*) *Sharman v. Brandt*, 1871, L. R. 6 Q. B. 720; 40 L. J. Q. B. 312, Ex. Ch.

(*m*) *Fairlie v. Fenton*, 1870, L. R. 5 Ex. 169; 39 L. J. Ex. 107.

(*n*) *Fawkes v. Lamb*, 1862, 31 L. J. Q. B. 98.

right of action in his own name on the contract (except in the case of an insurance broker) unless he has a beneficial interest in the completion thereof; in this respect, a broker differs from a factor or auctioneer, who has a right to sue by reason of his special property in the goods (*o*).

8. A shipmaster signs bills of lading merely as agent for the owners. He cannot sue in his own name for freight due under the bills of lading, not having contracted personally (*p*). Nor can he sue on an implied contract to pay demurrage (*q*).

9. The manager of a mutual insurance association subscribes a policy on behalf of the members of the association. He cannot sue in his own name for contributions due from the member effecting the policy, though the rules of the association purport to give him such a power (*r*).

10. By an agreement in writing, in consideration of the letting of certain tolls by commissioners, A. undertook to pay the rent to the treasurer of the commissioners. Held, that the treasurer had no right to sue in his own name for the rent, the contract being made in the names of the principals (*s*).

11. On a sale of land by a corporation, the mayor signed a contract "on behalf of himself and the rest of the burgesses and commonalty of the borough." The conditions provided that the corporation should convey, and a deposit be paid to the mayor. Held, that the mayor could not sue in his own name for breach of the contract (*t*).

(*o*) *Fairlie v. Fenton*, *supra*, note (*m*).

(*p*) *Repetto v. Millar's, &c. Forests*, (1901) 2 K. B. 306; 70 L. J. K. B. 561. *Comp. Cawthron v. Trickett*, 1864, 33 L. J. C. P. 182; 13 C. B. N. S. 754.

(*q*) *Brouncker v. Scott*, 1811, 4 Taunt. 1.

(*r*) *Evans v. Hooper*, 1875, 1 Q. B. D. 45; 45 L. J. Q. B. 206, C. A.

(*s*) *Pigott v. Thompson*, 1802, 3 B. & P. 147.

(*t*) *Bowen v. Morris*, 1810, 2 Taunt. 374, Ex. Ch. And see *Teed v. Elworthy*, 1811, 4 East, 210; *Lucas v. Beale*, 1851, 20 L. J. C. P. 134; 10 C. B. 739.

12. A bill of exchange is restrictively indorsed to a banker as agent for collection. He cannot sue on the bill (*u*).

### Article 129.

#### EFFECT OF INTERVENTION OF OR SETTLEMENT WITH THE PRINCIPAL.

Except as in this Article provided, the right of an agent to sue on a contract made on behalf of his principal ceases on the intervention of the principal, and a settlement with or set-off against the principal may be set up by way of defence to an action by the agent on the contract (*x*).

Provided that, where the agent has, as against the principal, a right of lien on the subject-matter of the contract, the right of the agent to sue on the contract has priority, so long as the claim secured by the lien remains unsatisfied, to that of the principal (*y*); and a settlement with or set-off against the principal cannot be set up by way of defence to an action by the agent on the contract where such settlement or set-off would operate to the prejudice of the claim secured by the lien, unless the defendant was induced by the terms or conditions of the contract, or by the conduct of the agent to believe, and did in fact believe, that the

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(*u*) *Williams v. Shadbolt*, 1885, 1 T. L. R. 417.

(*v*) Illustration 1. *Sadler v. Leigh*, 1815, 4 Camp. 195; *Rogers v. Hadley*, 1861, 32 L. J. Ex. 241; 2 H. & C. 227. And see *Dickenson v. Naul*, 1833, 4 B. & Ad. 638.

(*y*) Illustration 2.

agent acquiesced in a settlement being made with the principal, or that he (the defendant) would be entitled to such right of set-off (*z*).

### *Illustrations.*

1. A shipmaster chartered his ship in his own name, and the owner demanded and received from the charterer the freight due under the contract. Held, that the master could not maintain an action against the charterer for such freight, though he had given him notice not to pay it to anyone but himself (*a*).

2. A factor sells, in his own name, goods on which he has a lien for advances. While the advances are unpaid, the factor's right to sue the purchaser and compel payment has priority to that of the principal or his trustee in bankruptcy (*b*).

3. A broker sells, in his own name, goods on which he has made advances. The buyer has no right, in an action by the broker for the price, to set off a debt due to him from the principal (*c*).

4. An auctioneer sued for the price of goods sold and delivered. The defendant pleaded that the plaintiff acted as an auctioneer, and that the defendant had paid the principal for the goods before action. Held, that the plea was bad, because the auctioneer would have had, as against the principal, a lien on the proceeds for charges, &c. (*d*). The defendant should have shown that, either by the conditions of sale or by facts accruing subsequently, payment to the

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(*z*) Illustrations 3 to 6. And see *Taggart v. Marcus*, 1888, 36 W. R. 469.

(*a*) *Atkinson v. Cotesworth*, 1825, 3 B. & C. 647; 27 R. R. 350.

(*b*) *Drinkwater v. Goodwin*, 1775, Cowp. 251.

(*c*) *Atkyns v. Amber*, 1796, 2 Esp. 493.

(*d*) *Robinson v. Rutter*, 1855, 24 L. J. Q. B. 250; 4 El. & Bl. 954; 99 R. R. 849.

principal was permitted in discharge of the plaintiff's claim.

5. An auctioneer, on behalf of A., sold goods to B. A. was indebted to B., and there was an agreement between them before the sale that the price of any goods bought by B. should be set off against the debt, but the auctioneer had no notice of the agreement. The auctioneer permitted B. to take away the goods, thinking that he was going to pay for them, B. thinking that he was taking them in pursuance of his agreement with A. The auctioneer paid A. on account, and after receiving notice of the agreement between A. and B., paid him the balance of the proceeds of the sale, such balance exceeding the amount of B.'s purchases. The auctioneer subsequently sued B. for the price of the goods. Held, that, the auctioneer's charges having been paid before action, and he having had notice of the agreement between A. and B. at the time of his payment to A. (exceeding the amount for which he was suing B.), the settlement between A. and B. constituted a good defence (*e*). Here, the auctioneer was not really prejudiced by the settlement with the principal.

6. Goods belonging to A. and B. were sold by auction at A.'s house, and were described in the catalogue as A.'s property. C. bought some of the goods and settled with A., the auctioneer having permitted him to take away the goods without giving him notice not to pay A. D. also bought goods and was similarly permitted to take them away. The auctioneer brought actions against C. and D. Held, that the settlement between C. and A. was a good defence (*f*), and that D. was entitled to set off a debt due to him from A. (*g*).

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(*e*) *Grice v. Kenrick*, 1870, L. R. 5 Q. B. 340; 39 L. J. Q. B. 175. Comp. *Manley v. Berkett*, (1912) 2 K. B. 329; 81 L. J. K. B. 1232.

(*f*) *Coppin v. Walker*, 1816, 2 Marsh. 497; 17 R. R. 505.

(*g*) *Coppin v. Craig*, 1816, 2 Marsh. 501; 17 R. R. 508. See also *Holmes v. Tutton*, 1855, 24 L. J. Q. B. 346; 5 El. & Bl. 65; 103 R. R. 367.

## Article 130.

RIGHTS OF DEFENDANT WHERE AGENT SUES IN OWN  
NAME.

Where an agent sues in his own name on a contract made on behalf of his principal—

- (a) any statements which he has himself made, as well as the statements of the principal, may be used in evidence against him (*h*);
- (b) the defendant may avail himself of every defence, including that of set-off, which would have been available against the plaintiff if he had been suing on a contract made on his own behalf, even if the defence would not have been available in an action by the principal on the contract (*i*); and
- (c) the defendant is entitled to discovery to the same extent as if the principal were a party to the action, and to have the action stayed till such discovery is made, even in the case of a foreign principal (*j*).

*Illustration.*

A broker sues on a policy effected in his own name. Payment of the loss by settlement of accounts with the

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(*h*) *Smith v. Lyon*, 1813, 3 Camp. 465; 14 R. R. 810; *Bauerman v. Radenius*, 1798, 7 T. R. 663; *Welstead v. Levy*, 1831, 1 M. & Rob. 138.

(*i*) *Gibson v. Winter*, 1833, 2 L. J. K. B. 130; 5 B. & Ad. 96; 39 R. R. 411.

(*j*) *Willis v. Baddeley*, (1892) 2 Q. B. 324; 61 L. J. Q. B. 769, C. A. See, however, *Portugal (Queen of) v. Glyn*, 1837, 7 C. & F. 466, H. L.

broker, or by way of set-off, is a good defence, though it would not have been a valid payment as between the insurer and the assured (*k*).

### Article 131.

#### RIGHT OF AGENT TO SUE FOR MONEY PAID BY MISTAKE, ETC.

Where an agent pays money on his principal's behalf under a mistake of fact, or in respect of a consideration which fails, or in consequence of some fraud or wrongful act of the payee or otherwise under such circumstances that the payee is liable to repay the money, the agent may in his own name sue the payee for its recovery (*l*).

### Article 132.

#### NO RIGHT OF ACTION FOR PROMISED BRIBES.

No action can be maintained by an agent for the recovery of any property or money promised to be given to him by way of a bribe, whether he was, in fact, induced by such promise to depart from his duty or not (*m*).

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(*k*) *Gibson v. Winter*, *supra*, note (*i*).

(*l*) *Stevenson v. Mortimer*, 1778, Cowp. 805; *Holt v. Ely*, 1853, 1 E. & B. 795; 93 R. R. 398; *Langstroth v. Toulmin*, 1822, 3 Stark. 145; *Colonial Bank v. Exchange Bank*, 1885, 11 A. C. 84; 55 L. J. P. C. 14, P. C. In such a case, either the principal or the agent may sue.

(*m*) *Harrington v. Victoria Dock Co.*, 1878, 3 Q. B. D. 549; 47 L. J. Q. B. 594; *Laughland v. Millar*, 1904, 6 F. 413.



Sect. 4.—*Liabilities of agents in respect of wrongs committed on principal's behalf.*

Article 133.

AGENT PERSONALLY LIABLE FOR ALL WRONGS COMMITTED  
BY HIM.

Where loss or injury is caused to any third person, or any penalty is incurred, by any wrongful act or omission of an agent while acting on behalf of the principal, the agent is personally liable therefor, whether he is acting with the authority of the principal or not, unless the authority of the principal justifies the wrong (*n*), to the same extent as if he were acting on his own behalf (*o*).

This Article applies to public agents (*p*): provided that they must be sued individually, and not in their official capacity (*q*): provided also, that no

(*n*) See Illustrations 10 and 11.

(*o*) Illustrations 1 to 12. *Stevens v. Mid. Rail. Co.*, 1854, 10 Ex. 352; 23 L. J. Ex. 328 (malicious prosecution). See also Articles 134 and 135. The principal may be liable jointly and severally with the agent; and a judgment against the principal, though unsatisfied, is a bar to any action against the agent in respect of the same wrong: *Brinsmead v. Harrison*, 1872, L. R. 7 C. P. 547; 41 L. J. C. P. 190, Ex. Ch.; *Buckland v. Johnson*, 1854, 15 C. B. 145; 23 L. J. C. P. 204; 100 R. R. 280. Cf. *Goldrei v. Sinclair*, (1918) 1 K. B. 180; 87 L. J. K. B. 261, C. A.

(*p*) Illustration 13. *Hamilton v. Clancy*, (1914) 2 Ir. R. 514 (negligence of sub-postmaster in transmission of telegram). The defence of "act of state" is not available against a British subject: *Entick v. Carrington*, 1765, 19 St. Tr. 1030; *Sinclair v. Broughton*, 1882, 47 L. T. 170, C. A.

(*q*) *Raleigh v. Goschen*, (1898) 1 Ch. 73; 67 L. J. Ch. 59; *Roper*

public agent is liable for loss or injury caused to a member of any foreign State by any act authorized or ratified by the Crown or government (*r*).

### *Illustrations.*

1. An agent signed a distress warrant, and after the warrant was issued, but before it was executed, refused a tender of the rent. Held, that the agent was personally liable for the illegal distress (*s*).

2. The manager of a bank signed a letter, as such, falsely and fraudulently representing that the credit of a certain person was good. Held, that the manager was personally liable in an action for deceit (*t*). All persons directly concerned in the commission of a fraud are personally liable, though acting on behalf of others (*u*). But, in the absence of fraud, an agent is not personally liable for misrepresentations made by him on behalf of his principal (*x*).

3. A solicitor who is employed to conduct the sale of an estate conceals an encumbrance from the purchaser. He is personally liable for the concealment (*y*).

4. A solicitor, on his client's instructions, presents a bank-

*v. Commissioners of Works*, (1915) 1 K. B. 45; 84 L. J. K. B. 219. Public agents are not liable in their official capacity for the wrongful acts of subordinates: *Bainbridge v. Postmaster-General*, (1906) 1 K. B. 178; 75 L. J. K. B. 366, C. A.

(*r*) *Buron v. Denman*, 1848, 2 Ex. 167; 76 R. R. 554; *Salaman v. Secretary of State of India*, (1906) 1 K. B. 613; 75 L. J. K. B. 418.

(*s*) *Bennett v. Bayes*, 1860, 29 L. J. Ex. 224; 5 H. & N. 391; 120 R. R. 654.

(*t*) *Swift v. Jewesbury*, 1874, L. R. 9 Q. B. 301; 43 L. J. Q. B. 56, Ex. Ch.

(*u*) *Cullen v. Thomson*, 1862, 4 Macq. H. L. Cas. 424; *Bulkeley v. Dunbar*, 1792, 1 Anstr. 37; *Davis v. Carter*, 1887, 3 T. L. R. 88; *Bryldges v. Branfill*, 1841, 12 Sim. 369; 56 R. R. 71.

(*x*) *Eaglesfield v. Londonderry*, 1876, 38 L. T. 303, H. L.

(*y*) *Arnot v. Biscoe*, 1748, 1 Ves. 95; *Clark v. Hoskins*, 1867, 36 L. J. Ch. 689; *Peto v. Blades*, 1814, 5 Taunt. 657; 15 R. R. 609.

ruptcy petition against A., knowing that A. has not committed any act of bankruptcy. An action is maintainable against the solicitor for maliciously, and without reasonable and probable cause, presenting such petition, and causing A. to be adjudged bankrupt (*z*).

5. A., a printer, is employed to print pictures which are an infringement of copyright. A., though not aware of the infringement of copyright, is liable, as well as his employers, for penalties for the infringement (*a*).

6. A bailiff, employed to levy a distress, illegally distrains a lodger's goods. He is personally liable under the Law of Distress Amendment Act, 1908 (8 Edw. VII. c. 53) (*b*).

7. A ship is fitted with pumps which are an infringement of a patent. An injunction may be granted against the master, restraining him from using the pumps, or otherwise infringing the patent (*c*). But where a custom house agent merely passed through the custom house an article infringing a patent, and obtained permission for landing and storing it in magazines belonging to the principals, who were the importers, it was held that the acts of the agent did not amount to an exercise or user of the patent, and that therefore no action could be maintained against him in respect of the infringement (*d*).

8. The directors of a company negligently or know-

(*z*) *Johnson v. Emerson*, 1871, L. R. 6 Ex. 329; 40 L. J. Ex. 201.

(*a*) *Baschet v. London Illustrated Standard Co.*, (1900) 1 Ch. 73; 69 L. J. Ch. 35. *Comp. Kelly's Directories v. Gavin*, (1902) 1 Ch. 631; 71 L. J. Ch. 405, C. A.

(*b*) *Lowe v. Dorling*, (1906) 2 K. B. 772; 75 L. J. K. B. 1019, C. A.; affirming, (1905) 2 K. B. 501, decided under the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 76).

(*c*) *Adair v. Young*, 1879, 12 Ch. D. 13; *Hough v. Abergavenny*, 1874, 23 W. R. 40.

(*d*) *Nobel's Explosives Co. v. Jones*, 1882, 8 A. C. 5; 52 L. J. Ch. 339, H. L.

ingly (e) pay dividends out of the capital. They are jointly and severally liable to the creditors of the company (f).

9. An agent converts the goods or chattels of a third person to his principal's use. He is liable to the true owner for their value, even if he acted in good faith, in the belief that his principal was the owner of the goods or chattels (g). If, in such a case, the owner elects to waive the tort, and proceed against the agent for an account, the agent is only liable to account for so much of the proceeds of the converted property as still remains in his hands, and not for what he has duly handed over in the course of his agency to the principal (h).

10. *Agent acting as executor de son tort.*—An agent of an executor *de son tort* collects assets, and pays them over to his principal. The agent is personally liable to account for the assets to the right executor or administrator, or to the beneficiaries (i). But an agent who acts by the authority of a person who is subsequently granted probate or letters of administration is not liable to account as an executor *de son tort*, because the title of the executor or administrator relates back to the time of the death, and justifies the acts of the agent *ex post facto* (k).

11. An agent, on behalf of his principal, but without the principal's authority, distrains the goods of a third person. The principal ratifies the distress, which is justifiable at his

(e) See *Dovey v. Cory*, (1901) A. C. 477; 70 L. J. Ch. 753, H. L.

(f) *Re National Funds Ass. Co.*, 1878, 10 Ch. D. 118; 48 L. J. Ch. 163.

(g) *Perkins v. Smith*, 1752, 1 Wils. 328; *Crunch v. White*, 1835, 4 L. J. C. P. 113; 1 Scott, 314; 41 R. R. 616; *Stephens v. Elwall*, 1815, 4 M. & S. 259; 16 R. R. 458. And see Article 134.

(h) *Re Ely, Ex p. Trustee*, 1900, 48 W. R. 693, C. A.

(i) *Sharland v. Mildon*, 1846, 5 Hare, 469; 15 L. J. Ch. 434; 71 R. R. 180; *Padget v. Priest*, 1787, 2 T. R. 97; 1 R. R. 440; *Coote v. Whittington*, 1873, L. R. 16 Eq. 534; 42 L. J. Ch. 846.

(k) *Sykes v. Sykes*, 1870, L. R. 5 C. P. 113; 39 L. J. C. P. 179; *Hill v. Curtis*, 1866, 35 L. J. Ch. 133.

instance. The agent ceases to be liable, his act being justified by the ratification (*l*).

12. *Distinction between trespass and case.*—A solicitor, being retained to sue for a debt, by mistake and without malice takes all the proceedings to judgment and execution against another person of the same name as the debtor; or, having obtained judgment against the debtor, by mistake and without malice issues execution against another person of the same name. The solicitor is not liable for the wrongful seizure, unless he directed the sheriff to seize the goods or chattels of the wrong person (*m*). But where a solicitor directs the seizure of particular goods or chattels, he is personally liable if the seizure turns out to be a wrongful one (*n*). So, where a solicitor directs or personally takes part in the execution of a warrant for arrest, he is liable in an action for false imprisonment, if the warrant is illegal (*o*). This distinction is founded on the difference between the old actions of trespass and case. Trespass would not lie unless the injury was a direct consequence of the act of the defendant, but malice was unnecessary. Case would lie for indirect injuries, but malice was essential. The distinction is still important, for, although actions are not now classified under particular heads and forms, the Judicature Acts have not created any new causes of action.

13. A public agent threatens to do an act, purporting to

(*l*) *Hull v. Pickersgill*, 1819, 1 B. & B. 282; 21 R. R. 598. And see *Anderson v. Watson*, 1827, 3 C. & P. 214.

(*m*) *Davies v. Jenkins*, 1843, 1 D. & L. 321; 12 L. J. Ex. 386; 63 R. R. 744; *Childers v. Wooler*, 1860, 29 L. J. Q. B. 129; 2 El. & E. 287; 119 R. R. 725; *Collins v. Evans*, 1844, 5 Q. B. 820; 64 R. R. 656, Ex. Ch. Comp. *Clissold v. Cratchley*, (1910) 2 K. B. 244; 79 L. J. K. B. 635.

(*n*) *Rowles v. Senior*, 1846, 8 Q. B. 677; 70 R. R. 577; *Davies v. Jenkins*, *supra*; *Meredith v. Flaxman*, 1831, 5 C. & P. 99.

(*o*) *Green v. Elgie*, 1843, 5 Q. B. 99; 14 L. J. Q. B. 162; *Codrington v. Lloyd*, 1838, 8 A. & E. 449; *Eggington v. Lichfield*, 1855, 24 L. J. Q. B. 360; 5 E. & B. 100; 103 R. R. 387.

be in pursuance of statutory powers, but in fact outside the limits of such powers. He may be restrained by injunction at the instance of a person aggrieved (*p*).

#### Article 134.

##### CONVERSION BY INNOCENT AGENT.

Where an agent has the possession or control of goods or chattels, and—

- (a) sells and delivers, or otherwise deals with the possession of and assumes to deal with the property in the goods or chattels, without the authority of the true owner (*q*); or
- (b) refuses without qualification to deliver up possession thereof to the true owner on demand (*r*); or
- (c) transfers the possession thereof to his principal or any other person except the true owner, with notice of the claim of the true owner (*s*)—

he is guilty of a conversion of the goods or chattels, and is liable to the true owner for their value, even if he obtained possession from the apparent owner of the goods or chattels, and acted in good faith on

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(*p*) *Nireaha Tamaki v. Baker*, (1901) A. C. 561; 70 L. J. P. C. 66, P. C. See also *China Mutual Steam Nav. Co. v. Maclay*, (1918) 1 K. B. 33; 87 L. J. K. B. 95.

(*q*) Illustrations 1 to 6.

(*r*) Illustration 9.

(*s*) Illustration 7. *Powell v. Hoyland*, 1851, 6 Ex. 67; 20 L. J. Ex. 82; 86 R. R. 193; *Union Credit Bank v. Mersey Docks, &c. Board*, (1899) 2 Q. B. 205; 68 L. J. Q. B. 842.

the authority of such apparent owner (*t*). Provided, that this does not apply to acts done in good faith, and without notice of the claim of the true owner, on the authority of a mercantile agent, or of a buyer or seller, in possession of goods or of the documents of title thereto with the consent of the true owner, within the meaning of the Factors Act, 1889 (*u*). Provided also, that where a banker in good faith, and without negligence, receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title, or a defective title thereto, the banker does not incur any liability to the true owner of the cheque by reason only of having received such payment (*x*).

But an agent is not guilty of conversion who, in good faith, merely—

- (a) contracts on behalf of his principal to sell goods or chattels of which he has neither possession nor control (*y*); or
- (b) by the authority of the apparent owner, and without notice of the claim of the true owner, deals with the possession of, with-

(*t*) Illustrations 1 to 7.

(*u*) *Shenstone v. Hilton*, (1894) 2 Q. B. 452; 63 L. J. Q. B. 584. But see *Waddington v. Neale*, 1907, 96 L. T. 786. See the Factors Act set out in the Appendix.

(*x*) 45 & 46 Vict. c. 61, s. 82; Illustration 6.

(*y*) *Turner v. Hockey*, 1887, 56 L. J. Q. B. 301; *Barker v. Furlong*, (1891) 2 Ch. 172; 60 L. J. Ch. 368; *Cochrane v. Rymill*, 1879, 40 L. T. 744, C. A.

out assuming to deal with the property in the goods or chattels (*z*); or

- (c) refuses in such reasonably qualified terms to deliver up to the true owner goods or chattels in his possession by the authority of the apparent owner that the refusal does not amount to a repudiation of the title of the true owner (*a*).

### *Illustrations.*

1. An auctioneer was instructed to sell by auction furniture which the possessor and apparent owner had assigned by bill of sale to a third person. The auctioneer, who had no notice of the assignment, sold the furniture at the residence of the assignor, and, in the ordinary course of business, delivered it to the purchasers. Held, that the auctioneer was liable to the assignee for the value of the furniture (*b*).

2. A. obtained certain goods by fraud. B., a broker, bought the goods in his own name from A., thinking that they would suit C., a customer of his. B., having sold the goods to C. at the same price at which he had bought them from A., merely charging the usual commission, took delivery and conveyed the goods to the railway station, whence they were conveyed to C. The jury found that B. bought the goods merely as an agent, in the ordinary course of his business. Held, that B. was liable to the true owner for the value of the goods (*c*). Anyone who, however innocently,

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(*z*) Illustration 8. *Union Credit Bank v. Mersey Docks, &c. Board*, (1899) 2 Q. B. 205; 68 L. J. Q. B. 842.

(*a*) Illustration 9.

(*b*) *Consolidated Co. v. Curtis*, (1892) 1 Q. B. 495; 61 L. J. Q. B. 325, C. A.; *Barker v. Furlong*, (1891) 2 Ch. 172; 60 L. J. Ch. 368; *Brown v. Hickinbotham*, 1881, 50 L. J. Q. B. 426, C. A.

(*c*) *Hollins v. Fowler*, 1872, L. R. 7 Q. B. 616; 41 L. J. Q. B. 277; affirmed, L. R. 7 H. L. 757; 44 L. J. Q. B. 149, H. L.



obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or for that of any other person, is guilty of a conversion, and it is no answer to say that he was acting on the authority of another person who himself had no authority to dispose of them (*d*).

3. A. hired certain cabs from B., and obtained advances thereon from an auctioneer. The auctioneer, on A.'s instructions, and without notice of B.'s title, in good faith sold the cabs, and after deducting the advances and his expenses, paid the proceeds to A. Held, that the auctioneer was liable to B. for the value of the cabs, having had control of them, and having sold them in such a way as to pass the property therein (*e*). Otherwise, if he had not had possession or control of the cabs, and had merely contracted to sell, without delivering them (*e*).

4. An insurance broker effected a policy on behalf of A. A. became bankrupt, and after the adjudication instructed the broker to collect money due under the policy and pay it to him. The broker, without notice of the bankruptcy, collected the money and paid it to A. Held, that the broker was liable to the trustee in bankruptcy for the amount (*f*).

5. A banker collects for, and pays over to, a customer the amount of a post-office order, to which the customer has no title. The banker is liable for the amount to the true owner (*g*):

6. A banker collects a cheque, the indorsement to which has been forged, on behalf of a person who is not a customer

(*d*) *Hollins v. Fowler*, ante; *Union Credit Bank v. Mersey Docks, &c.*, (1899) 2 Q. B. 205; 68 L. J. Q. B. 842.

(*e*) *Cochrane v. Rymill*, 1879, 40 L. T. 744, C. A.; *Barker v. Furlong*, (1891) 2 Ch. 172; 60 L. J. Ch. 368.

(*f*) *McEntire v. Potter*, 1889, 22 Q. B. D. 438; *Pearson v. Graham*, 1837, 7 L. J. Q. B. 247; 6 A. & E. 899; 45 R. R. 644.

(*g*) *Fine Art Society v. Union Bank*, 1886, 17 Q. B. D. 705; 56 L. J. Q. B. 70, C. A.

of the bank, and who has no title to the cheque, and pays over the amount to such person. The banker is guilty of a conversion of the cheque, and is liable to the true owner for the amount thereof (*h*). Otherwise, in the case of a banker who, in good faith and without negligence, collects on behalf of one of his usual customers a crossed cheque (*i*).

7. A husband intrusted goods, which were the separate property of his wife, to an auctioneer for sale. The auctioneer received notice of the wife's claim, and subsequently sold a portion of the goods, and permitted the husband to remove the remainder. Held, that the auctioneer was liable to the wife for the value of the goods removed by the husband, as well as of those which had been sold (*k*).

8. A. held a bill of sale over horses in the possession of B.. B. took the horses to C.'s repository for sale by auction, and they were entered in the catalogue for sale. Before the sale took place, B. sold the horses by private contract

(*h*) *G. W. Rail. v. L. & C. Bank*, (1901) A. C. 414; 70 L. J. K. B. 915, H. L.; *Arnold v. Cheque Bank*, 1876, 1 C. P. D. 578; 45 L. J. C. P. 562; *Kleinwort v. Comptoir National d'Escompte*, (1894) 2 Q. B. 157; 63 L. J. Q. B. 674; *Mathews v. Brown*, 1894, 63 L. J. Q. B. 494; *Lacave v. Crédit Lyonnais*, (1897) 1 Q. B. 148; 66 L. J. Q. B. 266; *North and South Wales Bank v. Macbeth*; *Same v. Irvine*, (1908) A. C. 137; 77 L. J. K. B. 464, H. L.

(*i*) 45 & 46 Vict. c. 61, s. 82; *Clarke v. L. & C. Banking Co.*, (1897) 1 Q. B. 552; 66 L. J. Q. B. 354; *Akrokerry Mines v. Economic Bank*, (1904) 2 K. B. 465; 73 L. J. K. B. 742. A banker receives payment for a customer within the meaning of the enactment notwithstanding that he credits the customer's account with the amount of the cheque before receiving payment thereof: Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), s. 1, making *C. & C. Bank v. Gordon*, (1903) A. C. 240; 72 L. J. K. B. 451, H. L., in this respect not law. But a cheque crossed for the first time by the banker is not a crossed cheque within the meaning of the Act (S. C.). As to negligence, see *Morison v. L. C. & W. Bank*, (1914) 3 K. B. 357; 83 L. J. K. B. 1202, C. A.; *Crumplin v. L. J. S. Bank*, 1913, 109 L. T. 856; *Ladbroke v. Todd*, 1914, 111 L. T. 43; *Bissell v. Fox*, 1885, 53 L. T. 193, C. A.; *Hannan's v. Armstrong*, 1900, 5 Com. Cas. 188; *Bevan v. Nat. Bank*; *Same v. C. & C. Bank*, 1906, 23 T. L. R. 65.

(*k*) *Davis v. Artingstall*, 1880, 49 L. J. Ch. 609.

in C.'s yard. The price was paid to C., who deducted his commission and charges, and handed the balance to B., and the horses, on B.'s instructions, were delivered by C. to the purchaser. Held, that C., having merely delivered the horses according to B.'s orders, and not having himself sold or otherwise assumed to deal with the property in them, was not guilty of a conversion (*l*).

9. An agent in possession of goods by the authority of his principal, on demand by the true owner refuses to deliver them up without an order from the principal, or requires a reasonable time to ascertain whether the person demanding the goods is the true owner. Such a qualified refusal is not a conversion. Otherwise, where the refusal is absolute, or amounts to a setting-up of the principal's title to the goods (*m*).

#### Article 135.

#### LIABILITY FOR BREACH OF TRUST.

Where a banker or other agent, with notice of the trust, deals with trust money or property coming to his hands in a manner or for purposes inconsistent with the trust (*n*), or is otherwise a party to the commission of a breach of trust (*o*), he is personally liable to the *cestui que trust* in respect of the money

(*l*) *National Mercantile Bank v. Rymill*, 1881, 44 L. T. 767, C. A.

(*m*) *Alexander v. Southey*, 1821, 5 B. & A. 247; 24 R. R. 348; *Lee v. Bayes* (or *Robinson*), 1856, 25 L. J. C. P. 249; 18 C. B. 599; 107 R. R. 424; *Pillott v. Wilkinson*, 1864, 34 L. J. Ex. 22; 3 H. & C. 345, Ex. Ch.; *Wilson v. Anderton*, 1830, 1 B. & Ad. 450; 35 R. R. 348.

(*n*) Illustrations 1 and 2. *Cowper v. Stoneham*, 1893, 68 L. T. 18; *Hardy v. Caley*, 1864, 33 Beav. 365; *Magnus v. Queensland Bank*, 1888, 37 Ch. D. 466; 57 L. J. Ch. 413, C. A.; *Bridgman v. Gill*, 1857, 24 Beav. 302; 116 R. R. 128.

(*o*) *A.-G. v. Corporation of Leicester*, 1844, 7 Beav. 176; 64 R. R. 49; *Morgan v. Stephens*, 1861, 3 Giff. 226.

or property so dealt with, or for such breach of trust. But an agent who has no knowledge that a breach of trust is being committed is not personally liable merely because he acts, as agent, in a transaction which constitutes a breach of trust (*p*).

### *Illustrations.*

1. A banker transfers trust money from a trust account to the private account of the trustees. He is liable to the beneficiaries for the amount so transferred, whether he acquired any personal benefit from the transaction or not (*q*). No person is permitted to deal with trust funds or property in a manner known by him to be inconsistent with the trust (*q*). Otherwise, if the banker had had no notice that it was trust money (*r*).

2. An agent of an executor applies a fund, which he knows to be part of the assets of the testator, in satisfaction of advances made to the executor for his own business. The agent is personally liable to account for the fund to the beneficiaries under the will (*s*).

(*p*) *Barnes v. Addy*, 1873, L. R. 9 Ch. 244; 43 L. J. Ch. 513; *Gray v. Johnston*, 1868, L. R. 3 H. L. 1; *Keane v. Roberts*, 1819, 4 Madd. 332; 20 R. R. 306; *Coleman v. Bucks & Oxon Bank*, (1897) 2 Ch. 243; 66 L. J. Ch. 564; *Williams v. Williams*, 1881, 17 Ch. D. 437.

(*q*) *Pannell v. Hurley*, 1845, 2 Colly. 241; 70 R. R. 193; *Forston v. Manchester Building Society*, 1881, 44 L. T. 406; *Ex p. Kingston, Re Gross*, 1871, L. R. 6 Ch. 632; 40 L. J. Bk. 91; *Ex p. Adair, Re Gross*, 1871, 24 L. T. 198; *Bodenham v. Hoskyns*, 1852, 2 De G. M. & G. 903; 21 L. J. Ch. 864; 95 R. R. 363. Comp. cases cited in note (*p*).

(*r*) *Union Bank of Australia v. Murray-Aynsley*, (1898) A. C. 693; P. C.; *Bank of New South Wales v. Goulburn Valley Butter Factory*, (1902) A. C. 543; 71 L. J. P. C. 112.

(*s*) *Wilson v. Moore*, 1834, 1 Myl. & K. 127, 337; 36 R. R. 272.

**Article 136.**AGENTS NOT LIABLE FOR WRONGS OF CO-AGENTS OR  
SUB-AGENTS.

No agent is liable, as such, to any third person for loss or injury caused by the wrongful act or omission of a co-agent, not being his partner, or of a sub-agent, while acting on behalf of the principal, unless he authorized, or was otherwise party or privy to, such wrongful act or omission (*t*).

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(*t*) *Stone v. Cartwright*, 1795, 6 T. R. 411; 3 R. R. 220; *Bear v. Stevenson*, 1874, 30 L. T. 177, P. C.; *Weir v. Bell*, 1878, 3 Ex D. 238; 47 L. J. Ex. 704, C. A.; *Cargill v. Bower*, 1878, 10 Ch. D. 502; 47 L. J. Ch. 649; *Re Denham*, 1883, 25 Ch. D. 752. See, however, the Companies (Consolidation) Act, 1908 (8 Ed. 7, c. 69), s. 84, as to the liability of directors, &c. for misrepresentations in a prospectus or notice inviting subscriptions for shares: *Greenwood v. Leather Shod Wheel Co.*, (1900) 1 Ch. 421; 69 L. J. Ch. 131, C. A.; *Gerson v. Simpson*, (1903) 2 K. B. 197; 72 L. J. K. B. 603, C. A.; *Shepherd v. Bray*, (1907) 2 Ch. 571; 76 L. J. Ch. 692, C. A.

## CHAPTER XIII.

## DETERMINATION OF AGENCY.

## Article 137.

## DETERMINATION AND REVOCATION OF AGENT'S AUTHORITY.

THE authority of an agent is determined—

- (a) if given for a particular transaction, by the completion of that transaction (*a*);
- (b) if given for a limited period, by the expiration of that period (*b*);
- (c) by the destruction of the subject-matter of the agency (*c*);
- (d) by the happening of any event rendering the agency unlawful (*cê*), or upon the happening of which it is agreed between the principal and agent that the authority shall determine.

The authority of an agent may also be deter-

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(a) Illustrations 1 to 4.

(b) Illustrations 5 and 6.

(c) *Rhodes v. Forwood*, 1876, 1 App. Cas. 256; 47 L. J. Ex. 396, H. L.; *Northey v. Trevillion*, 1902, 7, Com. Cas. 201.

(cc) *Stevenson v. Aktiengesellschaft für Cartonnagen-Industrie*, (1917) 1 K. B. 842; 86 L. J. K. B. 516, C. A.

mined, subject to the provisions of Articles 138 to 144,—

- (a) by the death, lunacy, unsoundness of mind, or bankruptcy of the principal or agent (*d*); or, where the principal is a corporation or incorporated company, by the dissolution of the corporation or company (*e*);
- (b) by notice of revocation given by the principal to the agent (*f*);
- (c) by notice of renunciation given by the agent to the principal (*f*).

#### *Illustrations.*

1. A broker is employed to sell goods. Immediately the contract of sale is completed, he is *functus officio*, and cannot subsequently alter the terms of the contract without fresh authority from the principal (*g*).

2. A solicitor is retained to conduct an action. In the absence of express agreement to the contrary, his authority to act for the client ceases at the judgment (*h*).

3. An auctioneer is authorized to sell property. His authority ceases when the sale is completed (*i*).

4. A house agent was employed to let or sell a house. Having let the house, he negotiated for a sale, and subsequently found a purchaser. Held, that he had no authority

(*d*) See Articles 140 and 141.

(*e*) *Salton v. New Beeston Cycle Co.*, (1900) 1 Ch. 43; 69 L. J. Ch. 20.

(*f*) See Article 142.

(*g*) *Blackburn v. Scholes*, 1810, 2 Camp. 343; 11 R. R. 723.

(*h*) *Macbeath v. Ellis*, 1828, 4 Bing. 578; *Butler v. Knight*, 1867, L. R. 2 Ex. 109; 36 L. J. Ex. 66. And see *Reg. v. Leitrim JJ.*, (1900) 2 Ir. R. 397.

(*i*) *Seton v. Slade*, 1802, 7 Ves. 265, 276; 6 R. R. 124. See also *Bell v. Balls*, (1897) 1 Ch. 663; 66 L. J. Ch. 397.

to sell after having let the house, and that he was not entitled to commission on the sale (*k*).

5. A broker is authorized to sell goods. It may be shown that by the custom of the particular trade such an authority expires with the expiration of the day on which it is given (*l*).

6. A stockbroker is instructed to buy or sell stock or shares, subject to fixed limits. His authority *primâ facie* ceases at the expiration of the current account (*m*).

### Article 138.

#### WHEN AUTHORITY IRREVOCABLE.

Where the authority of an agent is given by deed (*n*), or for valuable consideration (*o*), for the purpose of effectuating any security (*p*), or of protecting or securing any interest of the agent (*q*), it is irrevocable during the subsistence of such security or interest (*r*). But the authority of an agent is not irrevocable merely because he has an interest in the exercise of it, or has a special property in, or lien for advances upon, the subject-matter thereof, the

(*k*) *Gillow v. Aberdare*, 1893, 9 T. L. R. 12, C. A.

(*l*) *Dickinson v. Lilwall*, 1815, 4 Camp. 279.

(*m*) *Lawford v. Harris*, 1896, 12 T. L. R. 275.

(*n*) Illustrations 1 and 2.

(*o*) Illustrations 3 to 6.

(*p*) *Walsh v. Whitcomb*, 1797, 2 Esp. 565; *Smart v. Sandars*, 1848, 5 C. B. 895; 17 L. J. C. P. 258; 75 R. R. 849.

(*q*) Illustrations 1 to 8. *Alley v. Hotson*, 1815, 4 Camp. 325.

(*r*) See *Chinmook v. Sainsbury*, 1860, 30 L. J. Ch. 409; *Frith v. Frith*, (1906) A. C. 254; 75 L. J. P. C. 50, P. C.



authority not being given expressly for the purpose of securing such interest or advances (*s*).

Where an agent is employed to enter into any contract, or do any other lawful act involving personal liability, and is expressly or impliedly authorized to discharge such liability on behalf of the principal, the authority becomes irrevocable as soon as the liability is incurred by the agent (*t*).

Where an agent is authorized to pay money on behalf of his principal to a third person, the authority becomes irrevocable as soon as the agent enters into a contract, or otherwise becomes bound, to pay or hold such money to or to the use of such third person (*u*).

Where an agent has a right to sue on a contract made on behalf of his principal, and would be entitled, as against the principal, to a lien on any goods, chattels, or money, recovered in respect of such contract or any breach thereof, the authority of the agent to sue and give a discharge for the

(*s*) Illustrations 3 to 7. *Lepard v. Vernon*, 1813, 2 V. & B. 51; 13 R. R. 13; *Frith v. Frith*, *supra*.

(*t*) Illustration 9. *Read v. Anderson*, 1884, 13 Q. B. D. 779; 53 L. J. Q. B. 532, C. A. The importance of this principle is much diminished by the Gaming Act, 1892. See Article 70.

(*u*) Illustration 10. *Robertson v. Fauntleroy*, 1823, 8 Moore, 10; *Burn v. Carvalho*, 1839, 9 L. J. Ch. 65; 4 Myl. & C. 690; 48 R. R. 213; *Metcalfe v. Clough*, 1828, 6 L. J. K. B. 281; 2 M. & R. 178; 32 R. R. 702; *Fisher v. Miller*, 1823, 7 Moore, 527; 25 R. R. 607; *Hodgson v. Anderson*, 1825, 3 B. & C. 842; *Hamilton v. Spottiswoode*, 1849, 4 Ex. 200; 18 L. J. Ex. 393; 80 R. R. 519; *Gardner v. Lachlan*, 1838, 4 Myl. & C. 129; 8 L. J. Ch. 82; 42 R. R. 124. See Article 126, as to when the agent becomes bound to the third person.

goods, chattels, or money recoverable in respect of such contract or breach thereof, is irrevocable during the subsistence of the claim in respect of which he would be entitled to such lien (*x*).

An authority expressed by this Article to be irrevocable is not determined by the death (*y*), lunacy, unsoundness of mind, or bankruptcy (*z*) of the principal, and cannot be revoked by him without the consent of the agent.

### *Illustrations:*

#### *Authority coupled with an interest.*

1. A., being indebted to B., gives him a power of attorney to sell certain land and discharge his debt out of the purchase-money. The power is irrevocable (*a*).

2. A. gave his sister a power of attorney to transfer certain stock, intending to give her the beneficial interest therein. Held, that a transfer executed after A.'s death in pursuance of the power of attorney was valid (*b*).

3. Goods are consigned to a factor for sale, with a certain limit as to price. The factor makes advances to the principal, in consideration of his giving him authority to sell at

(*x*) Illustration 11.

(*y*) Illustration 2. *Lepard v. Vernon*, 1813, 2 V. & B. 51; 13 R. R. 13; *Spooner v. Sandilands*, 1842, 1 Y. & Coll. C. C. 390; 57 R. R. 397. See, however, *Watson v. King*, 1815, 1 Stark. 121; 16 R. R. 690, where it was held that a power of attorney, though coupled with an interest, was revoked by the death of the donor.

(*z*) Illustrations 8, 10 and 11, and cases there cited.

(*a*) *Gaussen v. Morton*, 1830, 10 B. & C. 731; 34 R. R. 558. See also *Re Rose, Ex p. Hasluck*, 1894, 1 Manson, 218; *Gurnell v. Gardner*, 1863, 4 Giff. 626.

(*b*) *Kiddill v. Farnell*, 1857, 26 L. J. Ch. 818; 3 Sm. & G. 428; 107 R. R. 146.

the market price and retain the advances. The authority is irrevocable (*e*).

4. Goods are consigned to a factor for sale, and he makes advances to the principal on the credit thereof. Subsequently, the principal gives him authority to sell at the market price and retain the advances out of the proceeds. The authority is revocable, not being given for valuable consideration (*c*).

5. Goods are consigned to a factor for sale. He makes advances, in consideration of an agreement by the principal that his authority to sell shall be irrevocable. The authority is irrevocable (*e*). It is a question for the jury whether such an agreement was made, and it may be inferred by them from the circumstances (*f*). In the absence of such an agreement for valuable consideration, the authority of a factor to sell does not become irrevocable by the failure of the principal to duly repay advances made on the security of the goods (*e*).

6. A. signs and addresses to B. an underwriting letter by which he agrees, in consideration of a commission, to subscribe for a certain number of shares in a company, and authorizes B. to apply for the shares in his name and on his behalf. B., being a vendor to the company, and therefore having an interest in the raising of the capital, by letter accepts the terms of A.'s agreement. The authority given to B. to apply for the shares is irrevocable, and A. is bound to take the shares applied for and allotted in pursuance of the underwriting letter, although in the meantime he has given notice to B. and to the company repudiating the agreement (*g*).

(*c*) *Raleigh v. Atkinson*, 1840, 6 M. & W. 670; 55 R. R. 764.

(*e*) *Smart v. Sandars*, 1848, 5 C. B. 895; 17 L. J. C. P. 258; 75 R. R. 849; *De Comas v. Prost*, 1865, 3 Moo. P. C. (N. S.) 158, P. C.

(*f*) *De Comas v. Prost*, *supra*.

(*g*) *Carmichael's case*, (1896) 2 Ch. 643; 65 L. J. Ch. 902, C. A. *Comp. Re Consort, &c. Gold Mines, Stark's and Elliston's cases*, (1897)

7. An auctioneer was authorized to sell goods, and after he had incurred expenses in respect thereof, the principal revoked his authority. Held, that the authority of the auctioneer was not irrevocable merely by reason of his special property in the goods and his lien thereon for advances, and that he was liable to the principal in trespass for going to the premises to sell the goods after notice of the revocation (*h*).

8. The drawer of an accommodation bill, shortly before the bill was due, gave the acceptor money to pay it, and became bankrupt before the maturity of the bill. Held, that the authority to pay the bill, being given in performance of an implied contract of indemnity, was irrevocable, and that the acceptor was not liable to refund the amount to the trustee in bankruptcy of the drawer (*i*).

9. *Liability incurred by agent in pursuance of authority.*—A. employs B. to make a bet on his behalf, and authorizes him to pay the bet, if he loses it, out of moneys in his hands belonging to A. The authority becomes irrevocable as soon as the bet is made, provided that B. would incur loss in his business or suffer actual damage in the event of the bet not being paid (*j*).

10. An agent is authorized to pay to B. the proceeds of a sale of certain goods. The agent assents and promises B. that he will pay him, or that he will credit the proceeds to his account. The authority is irrevocable, and is not revoked by the principal's bankruptcy (*k*). It is immaterial that B.

1 Ch. 575; 66 L. J. Ch. 297, C. A.; *Re Bultfontein, &c. Mines, Ex p. Cox*, 1897, 75 L. T. 669, C. A.

(*h*) *Taplin v. Florence*, 1851, 10 C. B. 744; 84 R. R. 773.

(*i*) *Yates v. Hoppe*, 1850, 19 L. J. C. P. 180; 9 C. B. 541; 82 R. R. 429; *Chartered Bank v. Evans*, 1869, 21 L. T. 407, P. C. See also *Carter v. White*, 1883, 25 Ch. D. 666; 54 L. J. Ch. 138, C. A.

(*j*) Submitted, on the authority of *Read v. Anderson*, 1884, 13 Q. B. D. 779; 53 L. J. Q. B. 532, C. A. The principle of this decision still holds good, though the effect of its application is altered by the Gaming Act, 1892 (55 Vict. c. 9). See Article 70.

(*k*) *Crowfoot v. Gurney*, 1832, 9 Bing. 372; 2 L. J. C. P. 21; 35

is indebted to the agent, who retains the proceeds against such debt (*l*).

11. *Authority to sue cannot be revoked to prejudice of agent's lien.*—A factor sells goods on behalf of a principal, who afterwards becomes bankrupt. At the time of the bankruptcy the principal is indebted to the factor in respect of advances. The factor may, as against the principal's trustee in bankruptcy, compel the purchaser to pay the price to him, and may set off the amount of the advances; and his authority to give the purchaser a discharge for the price cannot be revoked by the principal, or by his trustee in bankruptcy (*m*).

### Article 139.

#### POWERS OF ATTORNEY IRREVOCABLE IN FAVOUR OF PURCHASERS FOR VALUE.

Where a power of attorney, created by an instrument executed after December 31st, 1882, and given for valuable consideration, is, in the instrument creating it, expressed to be irrevocable, or, whether given for valuable consideration or not, is, in the instrument creating it, expressed to be irrevocable for a fixed time therein specified not exceeding one year from the date of the instrument, then, in favour of a purchaser for valuable consideration—

- (a) the power is not revoked at any time, or during the time fixed (as the case may

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R. R. 557; *Walker v. Rostron*, 1842, 9 M. & W. 411; 60 R. R. 770; *Hutchinson v. Heyworth*, 1838, 9 A. & E. 375; 48 R. R. 530.

(*l*) *Dickinson v. Marrow*, 1845, 14 M. & W. 713.

(*m*) *Drinkwater v. Goodwin*, 1775, Cowp. 251: *Robson v. Kemp*, 1802, 4 Esp. 233; 8 R. R. 831.

be), either by anything done by the donor of the power without the concurrence of the donee, or by the death, lunacy, unsoundness of mind, or bankruptcy of the donor :

- (b) any act done by the donee, in pursuance of the power, at any time, or during the time fixed (as the case may be), is as valid as if anything done by the donor without his concurrence, or the death, lunacy, unsoundness of mind, or bankruptcy of the donor, had not been done or happened :
- (c) neither the donee, nor the purchaser, is at any time prejudicially affected by notice of anything done by the donor without the concurrence of the donee, or of the death, lunacy, unsoundness of mind, or bankruptcy of the donor, at any time, or during the time fixed (as the case may be)(*n*).

#### Article 140.

##### REVOCATION OF AUTHORITY BY DEATH OR INSANITY.

Subject to the provisions of Articles 138 and 139, the authority of every agent, whether conferred by deed or not, is determined by the death (*o*), lunacy,

(*n*) 45 & 46 Vict. c. 39 (Conveyancing Act, 1882), ss. 8 and 9.

(*o*) Illustrations 1 to 4. *Shipman v. Thompson*, 1738, Willes, 104, n.;

or unsoundness of mind (*p*) of either the principal or the agent; or, where the principal is a corporation or incorporated company, by its dissolution (*q*).

*Illustrations.*

1. A. undertakes to pay B. 100*l.* if B. succeeds in selling a picture at a certain price—"no sale, no pay." B. endeavours to sell the picture, and after A.'s death succeeds in doing so. The representatives of A.'s estate are not bound by the contract of sale (*r*), but they may ratify it if they think fit (*s*). Even if the representatives ratify the sale, they are not liable to pay B. the 100*l.* unless they ratify his contract with A., but they are liable to pay him a reasonable sum for the services performed (*t*).

2. A stockbroker had a continuation account open with a client. The client died, and the broker, failing to get instructions from his representatives, carried over the transactions instead of closing them on or before settling day, and ultimately sold the shares at a loss. It was held that the representatives were entitled to stand by the carrying over

*Farrow v. Wilson*, 1869, L. R. 4 C. P. 744; 38 L. J. C. P. 326; *Cottle v. Aldrich*, 1815, 4 M. & S. 175; 16 R. R. 433; *Phillips v. Jones*, 1888, 4 T. L. R. 401; *Houstoun v. Robertson*, 1816, 6 Taunt. 448; 16 R. R. 655; *Houstoun v. Bordenave*, 1816, 6 Taunt. 451; 16 R. R. 657. Commission may continue payable after the death of the agent: see Article 63, Illustration 13.

(*p*) See *Drew v. Nunn*, 1879, 4 Q. B. D. 661; 48 L. J. Q. B. 591, C. A.; *Daily Telegraph Newspaper Co. v. M'Laughlin*, (1904) A. C. 776, P. C. As to third persons dealing with the agent, without notice of the insanity, see Article 143, Illustration 2.

(*q*) Illustration 5.

(*r*) *Blades v. Free*, 1829, 9 B. & C. 167; 32 R. R. 620.

(*s*) *Foster v. Bates*, 1843, 12 M. & W. 226; 13 L. J. Ex. 88; 67 R. R. 311.

(*t*) *Campanari v. Woodburn*, 1854, 15 C. B. 400; 24 L. J. C. P. 13; 100 R. R. 406.

sale on the first settling day after the death, and that the broker was liable for the subsequent loss (*u*).

3. A contract of agency for a fixed period is made by or with a firm. The agency is determined by the death of any one of the partners before the expiration of that period (*x*).

4. A solicitor is retained to conduct a divorce suit. The retainer ceases on the death of the client pending the proceedings, and the solicitor cannot recover costs subsequently incurred, even if he has no knowledge of his client's death (*y*).

5. Pending an action against a company, the company was dissolved under the Companies Acts. Held, that the authority of the company's solicitor was determined by the dissolution, though he had no knowledge of it (*z*).

#### Article 141.

##### REVOCATION OF AUTHORITY BY BANKRUPTCY.

Subject to the provisions of Articles 138 and 139, the authority of every agent, whether conferred by deed or not (*a*), except an authority to do a merely formal act in completion of a transaction already binding on the principal (*b*), is revoked by the first act of bankruptcy committed by the principal within the three months next preceding the date of the presentation of a bankruptcy petition upon which

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(*u*) *Re Overweg, Haas v. Durant*, (1900) 1 Ch. 209; 69 L. J. Ch. 255.

(*x*) *Tasker v. Shepherd*, 1861, 6 H. & N. 575; 30 L. J. Ex. 207; *Re Friend, Friend v. Young*, (1897) 2 Ch. 421; 66 L. J. Ch. 737. *Comp. Phillips v. Hull Alhambra*, (1901) 1 K. B. 59; 70 L. J. K. B. 26.

(*y*) *Pool v. Pool*, 1889, 58 L. J. P. 67; *Whitehead v. Lord*, 1852, 7 Ex. 691; 21 L. J. Ex. 239; 86 R. R. 797.

(*z*) *Salton v. New Beeston Cycle Co.*, (1900) 1 Ch. 43; 69 L. J. Ch. 20.

(*a*) *Markwick v. Hardingham*, 1880, 15 Ch. Div. 339, C. A.; *Ex p. Snowball, Re Douglas*, 1872, L. R. 7 Ch. 534; 41 L. J. Bk. 49.

(*b*) Illustration 5.



the principal is afterwards adjudicated bankrupt (*e*).  
 Provided always that—

(a) where the authority is given in the course, and for the protection, of mutual dealings between the principal and the agent (*d*), it is not revoked by the bankruptcy of the principal, until either the agent has notice of an available (*e*) act of bankruptcy, or the receiving order is made (*f*);

(b) every payment or act (*g*) made to or by, or done by, the agent before the date of the receiving order, is as valid as if his authority had not been revoked by the bankruptcy of the principal, with respect to any third person dealing with him for valuable consideration without notice of any available (*e*) act of bankruptcy by the principal; and also with respect to the agent provided that at the time when the payment or act is made or done he has no notice of any such act of bankruptcy (*h*).

(*c*) 4 & 5 Geo. 5, c. 59 (Bankruptcy Act, 1914), s. 37; Illustrations 1 to 4.

(*d*) Illustration 6.

(*e*) *I.e.*, an act of bankruptcy, committed within the three months next preceding the presentation of the petition whereon the receiving order is made: 4 & 5 Geo. 5, c. 59, ss. 4 (1) and 167.

(*f*) Illustration 6.

(*g*) Payment or delivery to, or payment, conveyance, assignment, contract, dealing, or transaction by or with the agent.

(*h*) 4 & 5 Geo. 5, c. 59, s. 45; Illustrations 4, 7 and 8.

The question whether the authority of an agent is revoked by his bankruptcy depends upon the nature and terms of his employment (*i*).

*Illustrations.*

1. An agent has a general authority to sell and deliver goods belonging to his principal. The principal commits an act of bankruptcy. The authority of the agent is revoked by the act of bankruptcy, provided that the principal is subsequently adjudicated bankrupt upon a petition presented within three months after the date thereof (*k*); and if the agent sells the goods after receiving notice of the act of bankruptcy, he is liable to the trustee in bankruptcy for the value of the goods, or for the proceeds, at the option of the trustee (*l*).

2. An agent, in obedience to the instructions of his principal, pays away money belonging to the principal after receiving notice that he has committed an act of bankruptcy. The principal is adjudicated bankrupt upon a petition presented within three months after the act of bankruptcy. The agent is personally liable to repay to the trustee in bankruptcy the amount so paid away (*m*). So, if a banker pays the cheques of a customer after receiving notice that the customer has committed an act of bankruptcy, he cannot charge the customer with, nor prove in the bankruptcy for, the amounts so paid (*n*).

(*i*) See *M'Call v. Australian Meat Co.*, 1870, 19 W. R. 188; *Phelps v. Lyle*, 1840, 8 L. J. Q. B. 236; 10 A. & E. 113; *Hudson v. Granger*, 1821, 5 B. & A. 27; 24 R. R. 268.

(*k*) *Pearson v. Graham*, 1837, 6 A. & E. 899; 7 L. J. Q. B. 247; 45 R. R. 644; *Kynaston v. Crouch*, 1845, 14 L. J. Ex. 324; 14 M. & W. 266; 4 & 5 Geo. 5, c. 59, s. 37. See also *McEntire v. Potter*, 1889, 22 Q. B. D. 438.

(*l*) *King v. Leith*, 1787, 2 T. R. 141.

(*m*) *Re Lamb, Ex p. Gibson*, 1887, 55 L. T. 817.

(*n*) *Vernon v. Haukey*, 1787, 2 T. R. 113; 1 R. R. 444; *Hankey v.*

3. An agent, by the direction of his principal, makes a payment which the agent knows will, when completed, constitute an act of bankruptcy by the principal. The agent is not liable to the trustee in the subsequent bankruptcy merely by reason of the payment so made, because the act of bankruptcy had not been committed at the time when the payment was made (*o*).

4. A solicitor is authorized to conduct certain proceedings, and a sum of money is paid to him by the client for that purpose. The solicitor incurs expenses and costs, and then, after receiving notice of an act of bankruptcy by the client, appears on his behalf in opposition to a bankruptcy petition. The client is adjudicated bankrupt. The solicitor must repay to the trustee in bankruptcy the amount received from the bankrupt, after deducting the costs and expenses incurred prior to the notice of the act of bankruptcy (*p*).

5. An agent was by power of attorney given authority to execute an endorsement of sale on the register of a ship when she returned home. Held, that the power was not revoked by the bankruptcy of the donor, the act being merely a formal one, which the principal, though a bankrupt, might have been compelled to do (*q*).

6. An agent is authorized to receive the purchase-money of an estate and place it to the credit of the principal in an account of mutual dealings between the principal and agent. The agent receives the money after an act of bankruptcy by the principal, but before the date of the receiving order, without notice of the act of bankruptcy. The money becomes an item in the account between the principal and agent, and

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*Vernon*, 1787, 3 Bro. C. C. 313; *Ex p. Sharp*, 1844, 3 M. D. & De G. 490.

(*o*) *Ex p. Helder, Re Lewis*, 1883, 24 Ch. D. 339.

(*p*) *Re Whitlock*, 1893, 63 L. J. Q. B. 245; *Re Beyts*, 1894, 70 L. T. 561; *Re Pollitt*, (1893) 1 Q. B. 455; 62 L. J. Q. B. 236, C. A.; *Re Mander, Ex p. O. R.*, 1902, 86 L. T. 234. Comp. *Re Charlwood*, (1894) 1 Q. B. 643; 63 L. J. Q. B. 344.

(*q*) *Dixon v. Ewart*, 1817, Buck, 94.

may be set off by the agent as against the trustee in bankruptcy (*r*).

7. After an act of bankruptcy, but before the date of the receiving order, property of the bankrupt is conveyed to a purchaser for valuable consideration, in pursuance of a power of attorney given by the bankrupt, the purchaser acting in good faith, without notice of the act of bankruptcy. The purchaser has a good title as against the trustee in bankruptcy (*s*).

8. An agent, on behalf of his principal, enters into a contract after an act of bankruptcy by the principal, but before the date of the receiving order, the other contracting party having had no notice of any act of bankruptcy by the principal. The contract is as valid against the trustee in bankruptcy as it would have been against the principal if he had not become bankrupt (*t*).

(*r*) *Elliott v. Turquand*, 1881, 7 App. Cas. 79; 51 L. J. P. C. 1, P. C., as qualified by 4 & 5 Geo. 5, c. 59, s. 31. A delivery of property to an agent, with authority to convert it into money and receive the proceeds, is giving credit to the agent within the meaning of the mutual credit clause of the Bankruptcy Act, 1914, and he is entitled, on the bankruptcy of the principal, to exercise the right of set-off given by that clause, though the authority has not been exercised and the property is still unconverted at the time of the bankruptcy: *Naoroji v. Bank of India*, 1868, L. R. 3 C. P. 444; 37 L. J. C. P. 221; *Astley v. Gurney*, 1869, L. R. 4 C. P. 714; 38 L. J. C. P. 357, Ex. Ch.; *Palmer v. Day*, (1895) 2 Q. B. 618; 64 L. J. Q. B. 807.

(*s*) *Per cur. in Ex p. Snowball, Re Douglas*, 1872, L. R. 7 Ch. 534; 41 L. J. Bk. 49, as qualified by 4 & 5 Geo. 5, c. 59, s. 45.

(*t*) *Ex p. MacDonnell*, 1819, Buck, 399, as qualified by 4 & 5 Geo. 5, c. 59, s. 45.

**Article 142.**

DETERMINATION OF AUTHORITY BY NOTICE OF  
REVOCATION OR RENUNCIATION.

Subject to the provisions of Articles 138 and 139, the authority of an agent, whether conferred by deed or not(*u*), is determined by the principal giving to the agent notice of revocation at any time before the authority has been completely exercised(*x*), or by the agent giving to the principal notice of renunciation; but without prejudice to any claim for damages that the principal or agent may have against the other for breach of the contract of agency(*y*). Where the authority is conferred by two or more principals jointly, it is sufficient if the notice of revocation or renunciation be given by or to any one of the principals(*z*).

*Illustrations.*

1. An indenture of lease provided that an agent therein named should have authority to receive the rent on behalf of

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(*u*) Illustration 1. *Bromley v. Holland*, 1802, 7 Ves. 28; 6 R. R. 58.

(*x*) Illustrations 2 to 6. *Freeman v. Fairlie*, 1838, 8 L. J. Ch. 44; 49 R. R. 463.

(*y*) See Articles 42, 56 and 65. *Bovine v. Dent*, 1904, 21 T. L. R. 82. A contract of agency may be determined at will, in the absence of agreement, express or implied, to the contrary: *Alexander v. Davis*, 1885, 2 T. L. R. 142; *Henry v. Lawson*, 1886, 2 T. L. R. 199; *Motion v. Michaud*, 1892, 8 T. L. R. 447, C. A.; *Barrett v. Gilmour*, 1901, 6 Com. Cas. 72; *Joynson v. Hunt*, 1905, 93 L. T. 470, C. A.

(*z*) *Bristow v. Taylor*, 1817, 2 Stark. 50; 19 R. R. 675.

the lessor, and that his receipt should be a sufficient discharge, during the term thereby granted. Held, that the lessor might revoke the authority during the term, the agent having no interest in the rent (*a*). An authority, though given by deed, may be revoked by a verbal notice of revocation (*b*).

2. An auctioneer is authorized to sell certain goods by auction. His authority may be revoked by the principal at any time before the goods are knocked down to a purchaser (*c*). So, where a broker is authorized to buy or sell goods, the authority may be revoked at any time before the contract of purchase or sale is completed, and where writing is necessary, even after he has verbally contracted to buy or sell the goods (*d*). So, where a broker is authorized to effect a marine insurance policy, the authority may be revoked even after the underwriters have signed the slip, the contract, in consequence of the Stamp Act, 1891 (54 & 55 Viet. c. 39), ss. 93 and 97, not being binding until the policy is executed (*e*).

3. An agent undertakes to endeavour to sell a picture, and it is agreed that he shall receive remuneration only in the event of a sale. His authority may be revoked after endeavours by him to sell the picture (*f*).

4. Money is deposited with A., to be applied for the use of the poor. The authority may be countermanded at any

(*a*) *Venning v. Bray*, 1862, 31 L. J. Q. B. 181; 2 B. & S. 502. And see *Doward v. Williams*, 1890, 6 T. L. R. 316.

(*b*) *The Margaret Mitchell*, 1858, Swa. 382; *Rex v. Wait*, 1823, 11 Price, 518.

(*c*) *Warlow v. Harrison*, 1859, 1 El. & El. 309; 29 L. J. Q. B. 14; 117 R. R. 219, Ex. Ch.; *Manser v. Back*, 1848, 6 Hare, 443; 77 R. R. 187; *Re Hare and O'More's Contract*, (1901) 1 Ch. 93; 70 L. J. Ch. 45.

(*d*) *Farmer v. Robinson*, 1805, 2 Camp. 338, n.

(*e*) *Warwick v. Slade*, 1811, 3 Camp. 127; 13 R. R. 772. This applies only to contracts of marine insurance: *Thompson v. Adams*, 1889, 23 Q. B. D. 361.

(*f*) *Campanari v. Woodburn*, 1854, 15 C. B. 400; 24 L. J. C. P. 13; 100 R. R. 406.

time before the application of the money, and the money be recovered by the principal from A. (*g*). So, money received by an army agent from the Crown for officers' pay may be recalled by the Crown at any time before it has been paid to the officers, or the agent has contracted to hold it to their use, though he may have carried it to their credit in his books (*h*).

5. Money is deposited with a stakeholder, to be paid to the winner of a wager. The authority of the stakeholder may be revoked at any time before he has actually paid over the money to the winner, and if he pays it over after notice of revocation, he is personally liable to the depositor for the amount (*i*). So, where authority is given to pay money in respect of an unlawful transaction, the authority may be revoked at any time before the money has been paid over, even if it has been credited in account (*k*).

6. A. authorizes his banker to hold 20*l.* at the disposal of B. The authority of the banker may be countermanded, provided that he has not paid the money to B., nor contracted with him to hold it on his behalf (*l*).

(*g*) *Taylor v. Lendey*, 1807, 9 East, 49.

(*h*) *Brummell v. M'Pherson*, 1828, 5 Russ. 263.

(*i*) *Hampden v. Walsh*, 1876, 1 Q. B. D. 189; 45 L. J. Q. B. 238; *Batson v. Newman*, 1876, 1 C. P. D. 573, C. A.; *Diggle v. Higgs*, 1877, 2 Ex. D. 422; 46 L. J. Ex. 721, C. A.; *Trimble v. Hill*, 1879, 5 A. C. 342; 49 L. J. P. C. 49, P. C.; *Gatty v. Field*, 1846, 9 Q. B. 431. These cases are not affected by the Gaming Act, 1892: *O'Sullivan v. Thomas*, (1895) 1 Q. B. 698; 64 L. J. Q. B. 398; *Shoolbred v. Roberts*, (1900) 2 Q. B. 497; 69 L. J. Q. B. 800, C. A.; *Burge v. Ashley*, (1900) 1 Q. B. 744; 69 L. J. Q. B. 538, C. A.

(*k*) *Edgar v. Fowler*, 1803, 3 East, 222; 7 R. R. 433; *Smith v. Bickmore*, 1812, 4 Taunt. 474; *Taylor v. Bowers*, 1876, 1 Q. B. D. 291; 45 L. J. Q. B. 163, C. A.; *Hastelov v. Jackson*, 1828, 8 B. & C. 221; 32 R. R. 369.

(*l*) *Gibson v. Minet*, 1824, 9 Moo. 31.

**Article 143.**WHEN NOTICE OF REVOCATION TO THIRD PERSONS  
NECESSARY.

Where a principal, by words or conduct, represents, or permits it to be represented, that an agent is authorized to act on his behalf, he is bound by the acts of the agent, notwithstanding the determination of the authority otherwise than by the death (*m*) or bankruptcy (*n*) of the principal, to the same extent as he would have been if the authority had not been determined, with respect to any third person dealing with the agent on the faith of any such representation, without notice of the determination of his authority (*o*).

*Illustrations.*

1. A. authorizes B. to purchase goods on his credit, and holds him out to C. as his agent for that purpose. C. supplies goods to B., on A.'s credit, after revocation by A. of B.'s authority to act on his behalf, C. having had no notice of such revocation. A. is liable to C. for the price of the goods, even if B. was contracting on his own behalf, and did not intend to bind A. (*p*). Where a person holds out another as his agent, the person to whom that other is so held out is

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(*m*) See Illustration 4.

(*n*) See Article 141, as to revocation by bankruptcy.

(*o*) Illustrations 1 to 3. *Pole v. Leask*, 1862, 33 L. J. Ch. 155, H. L.; *Scarf v. Jardine*, 1882, 7 App. Cas. at p. 349, H. L.; *Curlewis v. Birckbeck*, 1863, 3 F. & F. 894; — v. *Harrison*, 12 Mod. 346; *Ryan v. Sams*, 1848, 12 Q. B. 460; 17 L. J. Q. B. 271; 76 R. R. 312.

(*p*) *Trueman v. Loder*, 1840, 11 A. & E. 589; 52 R. R. 451.



justified in dealing with him as such, until he receives notice that the authority has been revoked (*q*).

2. A husband holds out his wife as having authority to pledge his credit, and subsequently becomes insane. A tradesman, on the faith of such holding out, supplies goods to the orders of the wife, without notice of the husband's insanity. The husband is liable for the price of the goods (*r*).

3. A policy was effected through the local agent of an insurance company, and notice of a loss was given to him after he had ceased to represent the company. Held, that that was notice to "a known agent of the company" within the meaning of the policy, the assured having no knowledge of the determination of the agency (*s*).

4. A widow ordered necessaries from a tradesman to whom she had been held out by her deceased husband as having authority to pledge his credit, the tradesman having had no notice of the death. Held, that the estate of the husband was not liable for the price of the goods (*t*).

#### Article 144.

##### PROTECTION OF AGENT ACTING UNDER POWER OF ATTORNEY WITHOUT NOTICE OF REVOCATION.

Where a person makes or does any payment or act in good faith, in pursuance of a power of attorney, he is not liable in respect of the payment or act by reason that before the payment or act the

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(*q*) *Staveley v. Uzielli*, 1860, 2 F. & F. 30; *Ex p. Bright*, 1832, 2 Dea. & Ch. 8; *Aste v. Montague*, 1858, 1 F. & F. 264; 115 R. R. 903; *Willis v. Joyce*, 1911, 104 L. T. 576.

(*r*) *Drew v. Nunn*, 1879, 4 Q. B. D. 661; 48 L. J. Q. B. 591, C. A.

(*s*) *Marsden v. City and County Ass. Co.*, 1865, L. R. 1 C. P. 232; 35 L. J. C. P. 60.

(*t*) *Blades v. Free*, 1829, 9 B. & C. 167; 32 R. R. 620. See, however, judgment of Brett, L.J., in *Drew v. Nunn*, *supra*.

donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same. But this does not affect any right against the payee, of any person interested in any money so paid; and that person has the like remedy against the payee as he would have had against the payer if the payment had not been made by him (*u*).

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(*u*) 44 & 45 Vict. c. 41 (Conveyancing Act, 1881), s. 47.

## CHAPTER XIV.

## SUPPLEMENTARY.

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**Article 145.**

CONTRACT OF AGENCY WILL NOT BE SPECIFICALLY  
ENFORCED.

No action is maintainable at the suit of either principal or agent to compel the specific performance of a contract of agency (*a*). The Court may, however, restrain by injunction the breach of a negative stipulation in such a contract (*b*).

**Article 146.**

CRIMINAL LIABILITY OF PRINCIPAL FOR ACTS OF AGENT.

Except where otherwise expressly or by necessary implication provided by statute, no principal is criminally liable for any act or omission of his

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(*a*) *White v. Boby*, 1878, 37 L. T. 652, C. A.; *Muir v. Himalayan Tea Co.*, 1865, 14 W. R. 165; *Brett v. E. I. & L. Shipping Co.*, 1864, 10 L. T. 187; *Stocker v. Wedderburn*, 1857, 3 Kay & J. 393; 112 R. R. 204; *Stocker v. Brocklebank*, 1851, 20 L. J. Ch. 401; 3 Maon. & G. 250; 87 R. R. 87; *Pickering v. Ely*, 1843, 2 Y. & Coll. C. C. 249; 60 R. R. 132; *Whitwood Co. v. Hardman*, (1891) 2 Ch. 416; 60 L. J. Ch. 428.

(*b*) *Dietrichsen v. Cabburn*, 1846, 2 Phill. 52; 78 R. R. 17; *Mutual, &c. Life Ass. v. New York Ins. Co.*, 1896, 75 L. T. 528, C. A.; *Kirchner v. Gruban*, (1909) 1 Ch. 413; 78 L. J. Ch. 117. *Comp. Chapman v. Westerby*, (1913) W. N. 277.

agent, unless he authorized or connived at such act or omission (*c*).

*Illustrations.*

1. The master of a British ship overloaded her without the assent or knowledge of the owner. Held, that the owner was not liable to the penalty imposed by the 28th section of the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80) (*d*).

2. Gaming is carried on upon licensed premises to the knowledge of the servant left in charge of the premises, but without the knowledge or connivance of the licensed person. The licensed person has suffered gaming to be carried on upon the premises, within the meaning of the 78th section of the Licensing (Consolidation) Act, 1910 (10 Edw. VII. & 1 Geo. V. c. 24) (*e*). But the knowledge of a servant is not sufficient, unless he is in charge of the premises (*f*).

3. A licence-holder is not liable under the Licensing (Consolidation) Act, 1910, s. 68, for the act of a servant who knowingly sells intoxicating liquor in a bottle which is not corked and sealed to a child under the age of fourteen years, without the knowledge or connivance of the licence-holder, or of the person left in charge of the licensed premises (*g*).

4. A servant in charge of a vehicle containing coal mis-

(*c*) *Dickenson v. Fletcher*, 1873, L. R. 9 C. P. 1; 43 L. J. M. C. 25; *Hardcastle v. Bielby*, (1892) 1 Q. B. 709; 61 L. J. M. C. 101; *Taylor v. Nixon*, (1910) 2 Ir. R. 94; *Wake v. Dyer*, 1911, 104 L. T. 448. And see *Illustrations*.

(*d*) *Massey v. Morriss*, (1894) 2 Q. B. 412; 63 L. J. M. C. 185. See now the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 442.

(*e*) *Boud v. Evans*, 1888, 21 Q. B. D. 249; 57 L. J. M. C. 105; *Redgate v. Haynes*, 1876, 1 Q. B. D. 89; 45 L. J. M. C. 65.

(*f*) *Somerset v. Hart*, 1884, 12 Q. B. D. 360; 53 L. J. M. C. 77; *Comp. Mullins v. Collins*, 1874, L. R. 9 Q. B. 292; 43 L. J. M. C. 67.

(*g*) *Emary v. Nolloth*, (1903) 2 K. B. 264; 72 L. J. K. B. 620; *Conlon v. Muldowney*, (1904) 2 Ir. R. 498; *McKenna v. Harding*, 1905, 69 J. P. 354; *Allchorn v. Hopkins*, 1905, 69 J. P. 355; *Groom v. Grimes*, 1903, 89 L. T. 129. Cp. *Williams v. Pearce*, 1916, 85 L. J. K. B. 959.

represents to an inspector appointed under the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), the quantity of coal contained in the sacks. The employer is not liable to the penalty imposed by the 29th section of that Act for such misrepresentation (*h*).

5. A servant of a milk salesman adulterates his milk, and then sells it. The master is liable to be convicted as a seller of adulterated milk under the 6th section of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), whether he authorized or connived at the adulteration or not (*i*). So, a master or principal is liable under the Merchandise Marks Act, 1887, for offences against the Act committed by his servants or agents in the course of their employment (*k*).

6. A manufacturer was summoned under the 1st section of the Smoke Nuisance (Metropolis) Act, 1853 (16 & 17 Vict. c. 128) (*l*), for negligently using a furnace so that the smoke was not consumed. The furnace was constructed so as to consume the smoke, if properly used, but the stoker employed to attend to it had been careless. Held, that the defendant was not criminally liable for the negligence of the stoker, and could not be convicted (*m*). Otherwise, if he had been summoned under the 91st section of the Public Health Act, 1875 (38 & 39 Vict. c. 55) (*n*).

(*h*) *Roberts v. Woodward*, 1890, 25 Q. B. D. 412; 59 L. J. M. C. 129. And see *Anglo-American Oil Co. v. Manning*, (1908) 1 K. B. 536; 77 L. J. K. B. 205, where it was held that the possession by a servant of a false measure for his own fraudulent purposes was not, under the circumstances, the possession of his master.

(*i*) *Brown v. Foot*, 1892, 66 L. T. 649. And see *Collman v. Mills*, (1897) 1 Q. B. 396; 66 L. J. Q. B. 170; *Houghton v. Mundy*, 1910, 103 L. T. 60.

(*k*) *Coppen v. Moore*, (1898) 2 Q. B. 306; 67 L. J. Q. B. 689. See also *Monsell v. L. & N. W. Rail.*, (1917) 2 K. B. 837; 87 L. J. K. B. 82; *Warrington v. Windhill, &c. Socy.*, 1918, 118 L. T. 505.

(*l*) See now the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 23.

(*m*) *Chisholm v. Doulton*, 1889, 22 Q. B. D. 736; 58 L. J. M. C. 133. *Comp. Armitage v. Nicholson*, 1913, 108 L. T. 993.

(*n*) *Niven v. Geaves*, 1890, 54 J. P. 548.

7. An owner of works carried on for his profit by his agent is liable to be convicted in respect of a public nuisance proceeding from the premises, though the nuisance is caused by acts of the workmen, done without his knowledge and contrary to his general orders (*o*). An indictment for a public nuisance is a *quasi*-civil proceeding intended to prevent a recurrence thereof (*o*).

8. A trader harbours and conceals smuggled goods. He is liable to penalties for an illegal act done by his servant, in the conduct of the business, to protect the smuggled goods, though the act was done in his absence and on the exigency of the occasion (*p*).

9. A., who was licensed to sell beer by retail at the premises of a brewery company, of which he was secretary and manager, gave instructions to the draymen, who were sent to deliver beer, and authorized to receive payment for it, to customers who had given orders for it at the company's office, not to deliver to any persons who had not given such previous orders, and took reasonable care to prevent any infringement of such instructions. The beer was sold for cash on delivery, and no appropriation was made of bottles or crates to any particular customers. One of the draymen sold beer for cash in the street to persons who had not sent previous orders. It was held that such sales were outside the scope of the drayman's employment, and that A. was not liable to be convicted under sect. 3 of the Licensing Act, 1872 (*q*), for having sold intoxicating liquor at an unlicensed place (*r*).

(*o*) *Reg. v. Stephens*, 1865, L. R. 1 Q. B. 702; *Barnes v. Akroyd*, 1872, L. R. 7 Q. B. 474; 41 L. J. M. C. 110.

(*p*) *A.-G. v. Siddon*, 1830, 1 C. & J. 220; 35 R. R. 701. See also *A.-G. v. Riddle*, 1832, 2 C. & J. 493.

(*q*) See now the Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), s. 65.

(*r*) *Boyle v. Smith*, (1906) 1 K. B. 432; 75 L. J. K. B. 282. Comp. *Stansfeld v. Andrews*, 1909, 100 L. T. 529.

## APPENDIX.

### FACTORS ACT, 1889.

(52 & 53 VICT. c. 45.)

#### ARRANGEMENT OF SECTIONS.

*Preliminary.*

**Section.**

1. Definitions.

*Dispositions by Mercantile Agents.*

2. Powers of mercantile agent with respect to disposition of goods.
3. Effect of pledges of documents of title.
4. Pledge for antecedent debt.
5. Rights acquired by exchange of goods or documents.
6. Agreements through clerks, &c.
7. Provisions as to consignors and consignees.

*Dispositions by Sellers and Buyers of Goods.*

8. Disposition by seller remaining in possession.
9. Disposition by buyer obtaining possession.
10. Effect of transfer of documents on vendor's lien or right of stoppage in transitu.

*Supplemental.*

11. Mode of transferring documents.
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13. Saving for common law powers of agent.
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15. Commencement.
16. Extent of Act.
17. Short title.

SCHEDULE.

## FACTORS ACT, 1889.

52 &amp; 53 VICT. c. 45.

*An Act to amend and consolidate the Factors Acts.*

[26th August, 1889.]

BE it enacted, &amp;c. :

*Preliminary.***Definitions.**

## 1. For the purposes of this Act—

- (1.) The expression “mercantile agent” shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods :
- (2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf :
- (3.) The expression “goods” shall include wares and merchandise :
- (4.) The expression “document of title” shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented :
- (5.) The expression “pledge” shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability :
- (6.) The expression “person” shall include any body of persons corporate or unincorporate.

*Dispositions by Mercantile Agents.*

**Powers of mercantile agent with respect to**

2.—(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him



when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

Effect of pledges of documents of title.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Pledge for antecedent debt.

5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

Rights acquired by exchange of goods or documents.

6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

Agreements through clerks, &c.

Provisions as to consignors and consignees.

7.—(1.) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2.) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition by a mercantile agent.

*Dispositions by Sellers and Buyers of Goods.*

Disposition by seller remaining in possession.

8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

Disposition by buyer obtaining possession.

9. Where a person, having bought or agreed to buy goods (a), obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Effect of transfer of documents on vendor's lien or right of stoppage in transitu.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

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(a) See *Helby v. Matthews*, [1895] A. C. 471; 64 L. J. Q. B. 465, H. L.

*Supplemental.*

11. For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery. Mode of transferring documents.

12.—(1.) Nothing in this Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing. Saving for rights of true owner.

(2.) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3.) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.

13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act. Saving for common law powers of agent.

14 and 15. (*Repealed*, S. L. R. Act, 1908.)

16. This Act shall not extend to Scotland.

17. This Act may be cited as the Factors Act, 1889.

Extent of Act.  
Short title.

## PREVENTION OF CORRUPTION ACT, 1906.

6 Edw. 7, c. 34.

*An Act for the better Prevention of Corruption.*

[4th August, 1906.]

BE it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and

Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Punishment  
of corrupt  
transactions  
with agents.

- 1.—(1.) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;

he shall be guilty of a misdemeanour, and shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine, or on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding fifty pounds, or to both such imprisonment and such fine.

(2.) For the purposes of this Act the expression "consideration" includes valuable consideration of any kind; the expression "agent" includes any person employed by or acting for another; and the expression "principal" includes an employer.

(3.) A person serving under the Crown or under any corporation or any municipal borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act.

Prosecution  
of offences.

2.—(1.) A prosecution for an offence under this Act shall not be instituted without the consent, in England of the Attorney-General

or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland.

(2.) The Vexatious Indictments Act, 1859, as amended by any subsequent enactment, shall apply to offences under this Act as if they were included among the offences mentioned in section one of that Act. 22 & 23 Vict. c 17.

(3.) Every information for any offence under this Act shall be upon oath.

(4.) The expenses of any prosecution on indictment under this Act shall be defrayed as in cases of indictment for felony.

(5.) A court of quarter sessions shall not have jurisdiction to inquire of, hear, and determine prosecutions on indictments for offences under this Act.

(6.) Any person aggrieved by a summary conviction under this Act may appeal to a court of quarter sessions.

3. This Act shall extend to Scotland, subject to the following modifications:— Application to Scotland.

(1.) Section two shall not extend to Scotland:

(2.) In Scotland all offences which are punishable under this Act on summary conviction shall be prosecuted before the sheriff in manner provided by the Summary Jurisdiction (Scotland) Acts.

4.—(1.) This Act may be cited as the Prevention of Corruption Act, 1906. Short title and commencement.

(2.) This Act shall come into operation on the first day of January nineteen hundred and seven.



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